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Nos. 251 and 252

In the Supreme Court of the United States

OCTOBER TERM, 1957

PANAMA CANAL COMPANY, PETITIONER

v.

GRACE LINE, INC., ET AL.

GRACE LINE, INC., ET AL., CROSS-PETITIONERS

v.

PANAMA CANAL COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PANAMA CANAL COMPANY

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
PAUL A. SWEENEY,
HERMAN MARCUSE,
Attorneys,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 251

PANAMA CANAL COMPANY, PETITIONER

v.

GRACE LINE, INC., ET AL.

No. 252

GRACE LINE, INC., ET AL., CROSS-PETITIONERS

v.

PANAMA CANAL COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PANAMA CANAL COMPANY

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 213–234), is reported at 143 F. Supp. 539. The opinion of the United States Court of Appeals for the Second Circuit (R. 235–257),[1] is reported at 243 F. 2d 844.

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[1] By Chief Judge Clark for himself and Circuit Judge Hincks. Judge Frank's death occurred after the argument of the case.

JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 1957 (R. 258). The petitions for writs of certiorari were filed on July 6, 1957, and were granted on October 14, 1957 (R. 264), 355 U. S. 810. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. American shipowners have instituted an action in a District Court outside the District of Columbia designed to compel petitioner, a Government agency, to prescribe new and lower tolls for the Panama Canal. This raises the following questions:[1]

a. Whether judicial review is precluded because the subject matter of the action concerns the management of federal property subject to comprehensive supervision by the President and Congress, and the administrative action requires presidential approval.

b. Whether any federal court has jurisdiction to grant relief in the nature of mandamus in this matter.

c. Whether the District Courts outside the District of Columbia have jurisdiction to grant relief in the nature of mandamus.

d. Whether respondents have standing to challenge alleged violations of a statute involving the determination of fees charged for the use of the Panama Canal, a facility belonging to the Federal Government.

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[1] These questions restate the issues comprised in the first "question presented" in the petition in No. 251 (p. 2) and in the first question reserved in footnote 3, page 2, of that petition.

2. Whether the Court of Appeals erred in granting the respondents' motion for summary judgment, which had been stayed by the District Court until after disposition of petitioner's motion to dismiss for lack of jurisdiction, and where, in reliance on that ruling, the petitioner had not answered the motion for summary judgment.

3. Whether the courts have jurisdiction retrospectively to change Panama Canal tolls under the guise of awarding damages or reparations, where the controlling statute provides that any changes in the toll rates are subject to the approval of the President.*

STATUTES INVOLVED

1. Canal Zone Code, Title 2, Sections 411 and 412, as amended by the Act of September 26, 1950, 64 Stat. 1038, provide:

> 411. *Authority to Prescribe Measurement Rules and Tolls.*—The Panama Canal Company is authorized to prescribe and from time to time change (1) the rules for the measure-

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*This question restates the second question reserved in footnote 3, page 2, of the petition in No. 251.

†In our petition for a writ of certiorari in No. 251, we also raised the following question:

"2. Whether Sections 105 and 106 of the Government Corporation Control Act impose upon a Government corporation the ministerial duty to comply with the conclusions regarding accounting, cost allocation, and statutory interpretation reached by the Comptroller General in his commercial-type audit report."

Respondents' brief in opposition, however, emphatically denies reliance upon any such proposition. This issue is thus no longer in the case. Cf. *infra*, pp. 89-90.

ment of vessels for the Panama Canal, and (2), subject to the provisions of the section next following, the tolls that shall be levied for the use of the Panama Canal: *Provided, however,* That the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: *Provided further,* That the said corporation shall give six months' notice, by publication in the Federal Register, of any and all proposed changes in basic rules of measurement and of any and all proposed changes in rates of tolls, during which period a public hearing shall be conducted: *And provided further,* That changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive.

412. *Bases of Tolls.*—(a) Tolls on merchant vessels, army and navy transports, colliers, tankers, hospital ships, supply ships, and yachts shall be based on net vessel-tons of one hundred cubic feet each of actual earning capacity determined in accordance with the rules for the measurement of vessels for the Panama Canal, and tolls on other floating craft shall be based on displacement tonnage. The rate of tolls on vessels in ballast without passengers or cargo may be less than the rate of tolls for vessels with passengers or cargo.

(b) Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and

appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government.

(c) Vessels operated by the United States, including warships, naval tenders, colliers, tankers, transports, hospital ships, and other vessels owned or chartered by the United States for transporting troops or supplies, may in the discretion of the President of the United States be required to pay tolls. In the event, however, that such vessels are not required to pay tolls, the tolls thereon shall nevertheless be computed and the amounts thereof shall be treated as revenues of the Panama Canal Company for the purpose of prescribing the rates of tolls, and shall be offset against the obligations of the said corporation under paragraphs (c) and (e) of section 246 of this title, as amended.

(d) The levy of tolls is subject to the provisions of section 1 of article III of the treaty between the United States of America and Great Britain concluded on November 18, 1901, of articles XVIII and XIX of the convention between the United States of America and the Republic of Panama concluded on November

18, 1903, and of article I of the treaty between the United States of America and the Republic of Colombia proclaimed on March 30, 1922:

(c) Capital investment for interest purposes shall not include any interest during construction.

2. Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009, provides in pertinent part:

> SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) *Right of Review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> * * * * * * *

3. The Hay-Pauncefote Treaty, proclaimed by the President on February 22, 1902, 32 Stat. 1903, provides in pertinent part:

> ARTICLE III
>
> The United States adopts as the basis of the neutralization of such ship canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:
>
> 1. The canal shall be free and open to vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or

subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

* * * * * *

4. The Act of June 29, 1948, 62 Stat. 1075; Section 2 of the Act of August 12, 1949, amending Canal Zone Code, Title 2, Sections 51 and 52, 63 Stat. 601; the Act of September 26, 1950, 64 Stat. 1038; and other relevant portions of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, *et seq.*, are set forth in the Appendix, *infra*, pp. 147 ff.

STATEMENT

These proceedings instituted by respondents,[1] a number of American shipping companies using the Panama Canal (R. 4, 5), are designed to compel petitioner, the Panama Canal Company, (a) to prescribe new tolls for the use of the Canal, basing its computations upon accounts no less favorable to respondents than those used by the General Accounting Office, and (b) to refund tolls allegedly illegally collected in the past, claimed to mount to more than $27,000,000 (R. 8-9).

Respondents base their complaint upon certain statements in the Comptroller General's Audit Report for 1954[2] of the Panama Canal Company,[3] which are critical of some of petitioner's accounting prac-

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[1] Respondents in No. 251 and cross-petitioners in No. 252 are identical. We shall refer to them as "respondents".

[2] H. Doc. 160, 84th Cong., 1st Sess. R. 40-73.

[3] For the statutory basis of this Audit Report, see *infra*, p. 5, fn. 11.

tices.[8] The broad question presented by this litigation is whether the ultimate responsibility for the Panama Canal tolls lies with petitioner and the President, as provided for in the Canal Zone Code,[9] and with Congress, or whether, in the case of a disagreement between petitioner and the Comptroller General, financially-interested persons may adopt those parts of the Comptroller General's views which favor them, and, through judicial proceedings, compel petitioner to conduct its affairs in accord with the Comptroller General's position. We believe that a fairly detailed account of the statutes governing petitioner's corporate status and of those determining the tolls of the Panama Canal will assist in the exposition of the specific questions raised in this case.

1. THE BACKGROUND OF THIS LITIGATION

a. *The corporate organization of the Panama Canal Company.* Petitioner was created in 1950[10] by the transfer of the assets of the Panama Canal, and of the functions of operating and maintaining it, to the Panama Railroad Company, and by the change of

[8] Par. 10 of the complaint alleges that the accounting determinations of the General Accounting Office are final and binding on petitioner but not on respondents (R. 6). Par. 3 of the affidavit supporting respondents' motion for summary judgment states that this motion is based on the Comptroller General's Audit Report for 1954 (R. 13–15). Compare, however, respondents' disclaimer in their brief in opposition to the petition for certiorari in No. 251, p. 2, see *infra*, pp. 89–90.

[9] Title 2, Section 411 and 412, pp. 3–6.

[10] Act of September 26, 1950, 64 Stat. 1038, *infra*, pp. 159–169.

the latter's name to Panama Canal Company.[11] Prior to 1950, the Panama Canal was maintained and operated by the President through the Governor of the Canal Zone.[12] Certain business operations supporting the maintenance and operation of the Canal, however, were conducted by the Canal's adjunct, the Panama Railroad Company.[13] These supporting bus-

[11] For the reasons which lead to this transfer, see *infra*, pp. 14–18.

[12] Act of August 24, 1912, Section 3, 37 Stat. 561.

[13] The Panama Railroad Company was incorporated in 1849 under the laws of New York. Its entire capital stock was acquired by the United States during the construction of the Panama Canal. In 1945, it was designated a wholly-owned Government corporation. Section 101 of the Government Corporation Control Act, 59 Stat. 597, 31 U. S. C. (1946 Ed.) 846. In view of Section 304 (b) of the Government Corporation Control Act (59 Stat. 602, 31 U. S. C. 869), providing that no wholly-owned Government corporation shall operate after June 30, 1948, as an agency or instrumentality of the United States unless incorporated by act of Congress, the Act of June 29, 1948, 62 Stat. 1075 (*infra*, pp. 147–157) conferred a federal charter on the Panama Railroad Company as "an agency and instrumentality of the United States, and as an adjunct of the Panama Canal," "[f]or the purpose of conducting business operations incident to the care, maintenance, sanitation, operation, improvement, government, and protection of the Panama Canal." Canal Zone Code, Title 2, Section 245 (*infra*, p. 148).

The statement in the opinion of the Court of Appeals (R. 237) that the Act of June 29, 1948, was passed in order to subject the original Panama Railroad Company to the controls provided in the Government Corporation Control Act is not wholly correct. As we have pointed out, the Government Corporation Control Act covered the Panama Railroad Company from the day of its enactment in 1945, and the purpose of the 1948 Act, as expressed in its first section (*infra*, p. 147), was to comply with the requirement of Section 304 (b) of the Government Corporation Control Act that all wholly-owned Government corporations should be incorporated under federal law.

iness operations included the railroad across the Isthmus of Panama, a steamship line operating between the port of New York and the Canal, docks, harbor terminals and coaling plants for ships in the Isthmus, commissary stores supplying employees and ships, dry and cold storage plants for supplies, two hotels and the telephone system of the Canal Zone.[14] This Court has held that these business establishments constitute "auxiliaries primarily designed and used to aid in its [the Canal's] management and operation". *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401, 406, 408. Similarly, congressional committees have found that they are "essential to the operation of the Canal, and the maintenance of employees required in the conduct of the Canal enterprise".[15] The Canal Zone Code classifies these "business operations" as facilities and appurtenances of the Canal.[16] During the five fiscal years preceding the enactment in September 1950 of the statute transferring the functions of operating and maintaining the Panama Canal to the Panama Railroad Company (*supra*, p. 8, and *infra*, pp. 14–18), the annual net operating income of

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[14] Cf. *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401, 403. See also R. 174.

[15] H. Rept. No. 2396, 80th Cong., 2d Sess., pp. 1–2, R. 75; S. Rept. No. 1401, 80th Cong., 2d Sess., pp. 1–2.

[16] Title 2, Sections 51 and 52, *infra*, pp. 157–159.

the latter fluctuated between $2,438,428 in 1946 and $160,355 in 1949, averaging a little over $1,000,000.[17]

By the statute, petitioner (the Panama Canal Company) is "an agency and instrumentality of the United States" created "For the purposes of maintaining and operating the Panama Canal and of conducting business operations incident to such maintenance and operation and incident to the civil government of the Canal Zone";[18] as already noted, it is a wholly owned Government corporation within the meaning of Section 101 of the Government Corporation Control Act.[19] Its stock is held by the President

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[17] The net operating income amounted to:
1946: $2,438,428, H. Doc. 121, 81st Cong., 1st Sess., p. 2.
1947: $1,167,669, H. Doc. 121, 81st Cong., 1st Sess., p. 2.
1948: $982,692, H. Doc. 594, 81st Cong., 2d Sess., p. 4.
1949: $160,355, H. Doc. 594, 81st Cong., 2d Sess., p. 4.
1950: $557,778, H. Doc. 44, 82nd Cong., 1st Sess., p. 5.
The dividends of the Panama Railroad Company paid into the Treasury from 1904 to 1950 totaled $38,000,000. *Maintenance and Operation of the Panama Canal.* Hearing before a Subcommittee of the Committee on Armed Services, United States Senate, 81st Cong., 2d Sess. on H. R. 8677, p. 8 (R. 110).

[18] Canal Zone Code, Title 2, Section 245, as amended, 64 Stat. 1041 (*infra*, p. 164). Petitioner's corporate status is based on the Act of June 29, 1948, incorporating the Panama Railroad Company under federal law (*supra*, p. 9, fn. 13; *infra*, pp. 147–157), and the Act of September 26, 1950 (*infra*, pp. 159–169). Both Acts amend Title 2 of the Canal Zone Code.

[19] 59 Stat. 597, as amended by the Act of September 26, 1950, Section 2a (2), 64 Stat. 1038, 31 U. S. C. 846.

of the United States, or his designee called the "stockholder" (Canal Zone Code, Title 2, Section 246 (a)),[20] who appoints the directors of the Company to hold office at his pleasure.[21] The corporation has capacity to sue and be sued.[22]

b. *The authority to prescribe tolls for the Panama Canal.* Under the original Panama Canal legislation (Act of August 24, 1912, Section 5, 37 Stat. 562), the President of the United States was "authorized to prescribe and from time to time change the tolls that shall be levied by the Government of the United States for the use of the Panama Canal". Toll rates were not to be changed "unless six months' notice thereof shall have been given by the President by proclamation".[23] The toll rates were not to be less than 75¢ nor more than $1.25 per net registered ton. Acting under this authority, President Taft on November 13, 1912, prescribed the tolls for merchant vessels to be $1.20 per net vessel ton (Proclamation No. 1225, 37 Stat. 1769). The determination of the canal tolls under the 1912 statute required consideration of the tonnage of a vessel under the United States rules as well as under the Panama Canal rules

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[20] *Infra*, pp. 148–149. At present, the Secretary of the Army is the designated stockholder. H. Doc. 160, 84th Cong., 1st Sess., p. 4 (R. 45). See also R. 171.

[21] Canal Zone Code, Title 2, Section 247 (*infra*, pp. 151–152).

[22] Canal Zone Code, Title 2, Section 248 (d) (*Infra*, p. 152). Other portions of Section 248 and 249 (*Infra*, pp. 152–154), however, reserve important incidents of sovereignty to the Panama Canal Company.

[23] The Act of June 15, 1914, 38 Stat. 385, repealed the exemption from tolls of vessels engaged in the coastwise trading of the United States.

of measurement and this "dual system" of measurement enabled shipowners to reduce the basis for their toll payments, with the result that the $1.20 rate actually became fictional.[24]

The Act of August 24, 1937, 50 Stat. 750, abolished the dual system of measurement and lowered the ceiling on the tolls to $1.00 per net vessel-ton, retaining the floor of 75¢. On the basis of this authority, President Roosevelt changed the toll rates, effective March 1, 1938,[25] to 90¢ per net vessel-ton of 100 cubic feet each of actual earning capacity.[26] In 1948, President Truman, on the basis of a suggestion made in the House Appropriations Committee,[27] sought to increase the toll rate to the statutory maximum of $1.00.[28] Prompted by protests of the shipping industry (R. 237), however, Congress requested the President to postpone this rate increase and to submit a study "of the organizational aspects of all phases of the Panama Canal, including the Panama Railroad" and

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[24] 100 Cong. Rec. (Daily Ed.) A1996 (*infra*, pp. 177, 178); see also Encyclopedia Britannica, Vol. 17, pp. 173–174, Panama Canal: Administration and Finance: Tolls.

[25] Proclamation No. 2247, of August 25, 1937, 2 F. R. 1764, 1796.

[26] In view of the abolition of the dual rate of measurement (*supra*, pp. 12–13), this new rate did not necessarily constitute a lowering of the tolls. Cf. 100 Cong. Rec. (Daily Ed.) A1996 *infra*, p. 178.

[27] H. Rept. 1304, 81st Cong., 1st Sess., p. 3.

[28] Proclamation No. 2775 of March 26, 1948, 62 Stat. 1494.

to submit to Congress "his recommendations of suitable changes".[29]

On the basis of the study submitted pursuant to this congressional request and of the recommendations contained in it (H. Doc. 460, 81st Cong., 2d Sess. (R. 81–104)), Congress decided to separate the civil government functions of the Canal from its transit and business functions, and to operate the latter on a business basis by the Panama Railroad Company, to be renamed the Panama Canal Company (H. Rept. 2935, 81st Cong., 2d Sess., p. 2). At the same time, it was discovered that, if the Canal were operated at cost, the tolls would have to be raised to $1.40,[30] a clearly prohibitive figure.[31] Congress therefore decided to lower the financial burden imposed upon the Canal and its users. This goal was accomplished in several ways. The interest on the capital investment of the United States Government was lowered from 3 per centum to the going rate, or about 2.3 per

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[29] H. Rept. 1304, 81st Cong., 1st Sess., p. 7. See also 100 Cong. Rec. (Daily Ed.) A1996, *infra*, p. 179. Proclamation No. 2775, *supra*, fn. 28, was revoked by Proclamation No. 2903 of September 26, 1950, 64 Stat. A433.

[30] *Maintenance and Operation of the Panama Canal*, Hearing before a Subcommittee of the Committee on Armed Services, United States Senate, 81st Cong., 2d Sess. on H. R. 8677, September 1, 1950, pp. 7, 17 (R. 109, 126); *Miscellaneous Bills*, Hearing before the Committee on Armed Services, United States Senate, 81st Cong., 2d Sess. on S. 2222, etc., September 7, 1950, p. 18.

[31] *Miscellaneous Bills*, *supra*, fn. 30, p. 18.

centum;[32] interest accrued during the construction period was to be disregarded for the purposes of computing interest on the capital investment;[33] free transits of Government vessels were eliminated;[34] and finally the supporting business activities, previously operated by the Panama Railroad Company, were to bear a proportionate share of the cost of the Canal Zone Government from which they had hitherto been exempted.[35]

In order to carry out these objectives, Congress not only merged the functions of operating and maintaining the Canal with those of the Panama Railroad

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[32] S. Rept. 2531, 81st Cong., 2d Sess., p. 4 (R. 165); *Authorization and Provision for the Maintenance and Operation of the Panama Canal, etc.*, Hearings before the Subcommittee on Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives, 81st Cong., 2d Sess., p. 46; *Maintenance and Operation of the Panama Canal, supra*, fn. 30, p. 7 (R. 110).

[33] *Maintenance and Operation of the Panama Canal, supra*, fn. 30, p. 8 (R. 110–111); *Miscellaneous Bills, supra*, fn. 30, pp. 18–22; H. Rept. 2935, 81st Cong., 2d Sess., p. 5; S. Rept. 2531, 81st Cong., 2d Sess., p. 4 (R. 166).

[34] H. Rept. 2935, 81st Cong., 2d Sess., p. 2; S. Rept. 2531, 81st Cong., 2d Sess., p. 4 (R. 166); *Miscellaneous Bills, supra*, fn. 30, p. 17.

[35] H. Doc. 460, 81st Cong., 2d Sess., p. 14 (R. 99); *Miscellaneous Bills, supra*, fn. 30, p. 17. S. Rept. 2531, 81st Cong., 2d Sess., p. 4 (R. 165–166), estimates that the Canal operations would pay for one half of the cost of the Canal Zone Government and the supporting activities for the other half. The report does not explain how the supporting business activities whose average annual profit amounted to $1,000,000 (*supra*, pp. 10–11) would be able to increase their income to pay one half of the Canal Zone Government, then estimated to amount to $7,000,000 per annum (cf. *Miscellaneous Bills, supra*, fn. 30, pp. 17, 19).

Company, but also amended Sections 411 and 412 of Title 2 of the Canal Zone Code dealing with the methods of prescribing tolls and with the toll formula. The new Section 411 (*supra*, pp. 3–4) authorizes the petitioner "to prescribe, and from time to time change", the tolls for the use of the Canal. If the petitioner proposes a change, it shall give six months' notice by publication in the Federal Register. Public hearings are to be conducted during this interval. Any change in the tolls, however, "shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive". Section 411 also provides that the tolls prevailing at the time of its enactment shall remain in effect until changed pursuant to the procedures set forth in that section.

Section 412 (b) *supra*, pp. 4–6, contains the formula pursuant to which the petitioner shall compute the new tolls. It provides that the tolls shall be calculated to cover as nearly as practicable all costs of maintaining and operating the canal together with the related facilities and appurtenances including interest and depreciation, and an appropriate share of the cost of the Canal Zone Government. The statute further directs that, in the computation of this "appropriate share," substantial weight is to be given

> * * * to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within

the said corporation or from transactions with the Canal Zone Government.

Congress enacted this legislation reorganizing the corporate and administrative set-up of the Panama Canal with the firm conviction that the legislation would not add any cost to the Government, and that under the new formula the Canal tolls would rise by at least 5¢ to 95¢ per ton and this would produce about $1,400,000 additional revenue for the Canal.[36] In fact, in the summer of 1953, Congress directed the Panama Canal Company to complete its current study regarding the *adequacy* of the Canal tolls.[37] In its reply to this directive, the Company set forth its methods of determining whether or not new tolls should be prescribed. It explained that it was observing and evaluating continuously whether the current rates were proper and should be maintained

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[36] Section 412 (c) (*supra*, p. 5) eliminates the free transit of Government vessels, at least for accounting purposes. Section 412 (e) (*supra*, p. 6) provides that "Capital investment for interest purposes shall not include any interest during construction." Section 246 (c) (*infra*, pp. 164–165) contains the formula pursuant to which the interest rate is to be determined by the Secretary of the Treasury "as required to reimburse the Treasury for its cost".

[37] *Miscellaneous Bills*, *supra*, fn. 30, p. 22; 96 Cong. Rec. 13372, 13373, 13375, see also *infra*, pp. 86–88.

[38] *Miscellaneous Bills*, *supra*, fn. 30, pp. 18, 22; S. Rept. 2551, 81st Cong., 2d Sess., p. 5 (R. 167); 96 Cong. Rec. 13375; see H. Doc. 160, 84th Cong., 1st Sess., p. 2 (R. 42), the opinion of the District Court, fn. 17 (R. 220–221), and *infra*, pp. 87–88.

[39] See Statement of the Managers on the Part of the House, accompanying the Conference Report on the Civil Functions Appropriations Bill, 1954, H. Rept. 889, 83d Cong., 1st Sess., p. 10.

or whether an adjustment was required, and that it would propose new tolls whenever it should conclude that changes in rates were indicated and necessary.[40]

c. *The dispute between the Comptroller General and the Panama Canal Company.* The Comptroller General's reports on the Panama Canal Company[41] for 1954[42] expressed the view that the Company had allocated too high a share of the costs of the Canal Zone Government, of the corporate overhead, and of interest payments, to the Canal operations and an inadequate one to the supporting activities, most of which formerly had been administered by the Panama Railroad Company (see *supra*, pp. 9–10). According to the Comptroller General's method of cost allocation, the Canal operations showed a large surplus, the supporting activities a commensurate deficit.[43] The

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[40] 100 Cong. Rec. (Daily Ed.) A1995 (*infra*, pp. 173–176).

[41] As noted *supra*, p. 11, petitioner is subject to the provisions of the Government Corporation Control Act. Pursuant to Section 105 of that statute (59 Stat. 599, 31 U. S. C. 850), the financial transactions of all wholly-owned Government corporations are subject to an annual audit by the General Accounting Office in "accordance with the principles and procedures applicable to commercial corporate transactions". Under Section 106 of that Act (59 Stat. 599, 31 U. S. C. 851), the Comptroller General shall report on this audit to Congress with "such comments and information as may be deemed necessary to keep Congress informed of the operations and financial condition of the several corporations, together with such recommendations with respect thereto as the Comptroller General may deem advisable * * *". See *infra*, p. 50.

[42] H. Doc. 160, 84th Cong., 1st Sess. (R. 40–73).

[43] The Comptroller General's theories concerning the proper allocation of expenses to the petitioner's several activities did not affect petitioner's over-all profit or loss.

Comptroller General also claimed that the prices charged by the supporting activities were inadequate because petitioner failed to include among the recoverable cost elements an appropriate share of the cost of the Canal Zone Government, and corporate overhead.

Having determined that, according to his method of cost allocation, the Canal operations resulted in a large surplus and those of the supporting operations in a considerable loss, the Comptroller General was of the view that, under his interpretation of Section 412 (b) of the Canal Zone Code, *supra*, pp. 4–5, the tolls had to be computed exclusively on the basis of the cost of operating the Canal without reference to the losses incident to its supporting operations—and thus would have to be lowered considerably "if hearings were held at this time" (R. 43). He agreed, however, that this result was financially and economically unsound because the losses of the supporting activities, which he conceded to be essential to the operation of the Canal and to the maintenance of its personnel, were largely attributable to fringe benefits to the Canal employees and to its users, and actually constituted a legitimate element of the Canal's cost of operations (R. 56, 59). The Comptroller General also recognized that, if under his reading of the statute this deficit of the supporting activities could not be met out of Canal tolls, funds would have to be appropriated by Congress to cover it. This meant that the Canal users, more than half of which are

of foreign registry,[44] would receive a substantial subsidy at the expense of the American taxpayers.[45] He, therefore, recommended legislation amending Section 412 (b) to provide specifically that any losses of the supporting activities should be included in the cost basis for the determination of the Canal tolls.[46]

Petitioner has advised Congress of its vigorous disagreement with the Comptroller General's audit report.[47] It considers his cost allocation methods and conclusions to be in conflict with sound business and

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[44] R. 73, 174, 183–184, 248. According to the petitioner's annual report for the fiscal year ended June 30, 1956, American vessels account for 26 per centum of the transit and 30 per centum of the tolls paid during that year. A German vessel made 54 transits during that period, H. Doc. 99, 85th Cong., 1st Sess., pp. 11–13, 63. During the preceding year a Danish vessel established a record of 55 transits. H. Doc. 351, 84th Cong., 2d Sess., p. 13.

[45] This result would be in direct conflict with the expressed congressional objective that the Canal would be totally self-supporting and that the new tolls formula would not cast any burden on the American taxpayer (*supra*, p. 17).

[46] H. Doc. 160, 84th Cong., 1st Sess., pp. 2–3, 8–9, 14, 16 (R. 43, 46–47, 56, 59).

[47] For petitioner's position, see *Operations of the Panama Canal Company*, Hearings before Subcommittee No. 3, Panama Canal, Committee on Merchant Marine and Fisheries, House of Representatives, 83d Cong., 2d Sess., pp. 8–10; *Changes in the Administration of the Panama Canal Company*, Hearings before the Subcommittee on Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives, 84th Cong., 1st Sess., on H. R. 6917, etc., pp. 160–161; *Panama Canal (Changes in Administration)*, Hearings before the Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 84th Cong., 2d Sess., on S. 2167, pp. 68–70. See also the Comptroller General's Audit Report for 1956, H. Doc. 210, 85th Cong., 1st Sess., pp. 68–69.

accounting practices and without any legal foundation.[48] Petitioner objects particularly to the Comptroller General's view that the statute requires the computation of toll rates without regard to any deficit in the operation of the supporting business activities. In contrast to the Comptroller General, who realized that his reading of the statute results in an economic absurdity and therefore recommended that Section 412 (b) be amended, petitioner takes the position that this unreasonable result (which follows from the Comptroller's reading of the statute) cannot possibly represent the true congressional purpose and that no correction of the toll formula is needed.[49]

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[48] Petitioner's position, briefly, is that the statute does not require the allocation of corporation overhead and interest to the supporting business activities, and that the statutory phrase of Section 412 (b) that in the allocation of the cost of the Canal Zone Government "substantial weight shall be given to the ratio * * *" (*supra*, p. 16) does not require the use of a strictly mathematical ratio but that consideration has to be given to business and economic realities. These facts, among others, are that any substantial increase in the charges of the supporting activities will either price them out of the market (and thus create actual, as distinguished from accounting, deficits under the economic laws of diminishing return) or require the payment of higher cost-of-living allowances to Canal employees and thereby directly increase the cost of operating the Canal. See *infra*, pp. 82–84.

The Comptroller General's Report for 1956 concedes that "the Company's views on allocation of general corporate expense are valid". H. Doc. 210, 85th Cong., 1st Sess., p. 16.

[49] Petitioner considers the maintenance and operation of the Panama Canal as its primary and sole operational mission under its charter. In its opinion, the supporting business activities are maintained only in order to contribute to the performance of that mission. Accordingly, any deficit incurred

On the basis of its own methods of cost allocation, its own business judgment, and its own interpretation of Section 412, petitioner concludes that the tolls currently charged comply with the statutory toll formula and that toll changes are neither "indicated" nor "necessary".[50]

The Comptroller General's Report for 1954 was transmitted to Congress on May 16, 1955 (R. 40). Since then, Congress, fully advised of this dispute,[51] has approved the Department of Commerce and Related Agencies Appropriation Acts for 1956, 1957 and 1958, which include the budgets of the Panama Canal Company for those years based upon petitioner's interpretation of the statute and its methods of accounting and cost allocation.[52]

2. THE PROCEEDINGS IN THE DISTRICT COURT

On September 13, 1955, *i. e.*, within four months after the Comptroller General's Report for 1954 had

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by the supporting activities constitutes a cost element in the Canal operations which is recoverable under the tolls formula of Section 412 (b). Cf. the congressional documents referred to *supra*, p. 19, fn. 47, and the express congressional directive contained in Canal Zone Code, Title 2, Section 246 (e), *infra*, p. 165, making the net costs of operating the Canal Zone Government "an integral part of the costs of operation of the Panama Canal enterprise *as a whole*." (Emphasis added.) See *infra*, pp. 84–89.

[50] Cf. 100 Cong. Rec. (Daily Ed.) A1995 (*infra*, p. 174). See also *Changes in the Administration of the Panama Canal Company*, *supra*, fn. 47, p. 163, and *Panama Canal (Changes in Administration)*, *supra*, fn. 47, p. 94.

[51] Cf. *supra*, p. 20, and see also *Department of Commerce and Related Agencies Appropriations for 1957*, Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 84th Cong., 2d Sess., pp. 691–697.

[52] 69 Stat. 235–237; 70 Stat. 322–324; 71 Stat. 78.

been submitted to Congress, respondents filed their complaint, alleging in substance that the Canal tolls were excessive, as evidenced by the Comptroller General's report, and praying for judgment requiring petitioner (a) to prescribe new tolls on the basis of the accounts proposed by the General Accounting Office, and (b) to refund the allegedly excessive tolls collected in the past (R. 4–9). Six weeks later, *i. e.*, before petitioner's 60-day time to answer had expired, respondents moved for summary judgment (R. 10–185) [53] and instituted extensive discovery proceedings (cf. R. 196, 209–210, 212–213).

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[53] The motion asked for a judgment containing, among others, the following provisions:

"1. Declaring the duty of defendant to proceed forthwith to prescribe tolls as provided by Section 12, Public Law 841, 81st Congress, propose changes in tolls as indicated by said prescription and conduct a public hearing, all according to law;

"2. Enjoining and restraining the defendant from further unlawfully withholding and unreasonably delaying the prescription of tolls as provided by Section 12, Public Law 841, 81st Congress, the proposal of changes in tolls as indicated by said prescription and the conduct of a public hearing, all according to law;

"3. Commanding and directing the defendant forthwith to prescribe tolls as provided by Section 12, Public Law 841, 81st Congress, propose changes in tolls as indicated by said prescription and conduct a public hearing, all according to law;

"4. Enjoining and restraining the defendant in the prescription of tolls from using accounts less favorable to the plaintiffs and their class than those determined by the General Accounting Office;

"5. Retaining jurisdiction of the cause so as to issue appropriate orders and decrees that the defendant prescribe tolls, propose changes in tolls and conduct a public hearing according to law; * * *." (R. 11.)

Petitioner moved to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to join the United States as an indispensable party, and also moved for a stay of all other proceedings pending the determination of its motion to dismiss (R. 185, 196). The District Court granted these stays (R. 207–210, 211–212, 212–213) in order to obviate the need to answer the complex motion for summary judgment should it determine that it lacked jurisdiction to entertain the proceedings (R. 205). It stressed that in passing on the motion to dismiss it would concern itself only with the issue whether it had jurisdiction to hear the case, and that the only answer it would give the parties would be either that it could not entertain the proceedings at all, or that it could, in which case there would "be a fresh slate and a fresh start" (R. 202). In these circumstances, petitioner refrained from submitting affidavits and other materials controverting the allegations and data contained in the motion for summary judgment.

The District Court dismissed the complaint for lack of jurisdiction (R. 229, 234).[54] It held that Sections 411 and 412 of the Canal Zone Code conferred upon petitioner the discretionary power and duty to determine the time when in its judgment new tolls should be prescribed, and that this function was by no means of a ministerial nature. In addition, the District Court took the position that, inasmuch as

[54] We cannot find any basis for the statement by the Court of Appeals (R. 236) that the District Court granted summary judgment for petitioner.

any new tolls determined by petitioner had to be approved by the President, petitioner's rate-making activities constituted advice to the President and were not subject to judicial review, and that, in any event, respondents lacked standing to sue because the Canal Zone Code did not confer upon them any private legal right. With respect to the demand for a refund of tolls, the court held that the action was in effect one against the President and against the United States, and thus could not be maintained.

3. THE DECISION OF THE COURT OF APPEALS

The Court of Appeals affirmed the decision of the District Court to the extent that it denied the demand for a refund (R. 256–257). In all other respects, however, it reversed the District Court and directed that summary judgment be entered for the respondents. This was done although the District Court had never passed on the respondents' motion for summary judgment, and petitioner never had an opportunity to challenge that motion on the merits (*supra*, p. 24).

After conceding that the interpretation placed by petitioner on the statute was "reasonable from the naked words" of the statute (R. 245), the Court of Appeals determined the merits of the case, accepted the position of the Comptroller General, and took the allegations of the complaint and those of the motion for summary judgment at their face value (R. 248–249). It concluded that the tolls were out-of-line with costs and that petitioner had failed to comply

with its mandatory statutory duty to prescribe new tolls (R. 249).

Having determined the merits of the case, the Court of Appeals passed to the jurisdictional issues. It held that, under the statutory rate-making scheme, petitioner's activities were predominant and those of the President negligible, and that, accordingly, petitioner's functions, not being those of a mere advisor to the President, were fully subject to judicial review (R. 251–254). The court intimated that the courts could re-examine the rates even after their approval by the President, unless he actually changed the rates proposed to him by petitioner (R. 253). In reaching this result, the court was influenced by the circumstance that petitioner is a Government corporation amenable to suit and engaged in activities similar to those of private business concerns (R. 238, 246, 252, 255, 257).[55] With respect to the standing-to-sue issue, the court held that the Canal Zone Code and the Hay-Pauncefote Treaty, 32 Stat. (Pt. 2) 1903, conferred actionable rights on the respondents; further, that the failure of the President and Congress to remedy the alleged misinterpretation by petitioner of the Canal Zone Code, although brought to their attention, did not permit an inference of ratification, but merely meant that if the President and Congress were too busy to give redress the courts remained open to give relief to the plaintiffs.

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[55] In a similar vein, the court held that the decisions pursuant to which the inferior federal courts outside the District of Columbia lacked jurisdiction to maintain mandamus proceedings are inapplicable because petitioner is a corporation and thus subject to mandatory injunctions (R. 257).

4. THE SCOPE OF THE DECISION BELOW AND THE APPLICATIONS TO STAY THE PROCEEDINGS PENDING REVIEW IN THIS COURT

The decision of the Court of Appeals directed the District Court to enter summary judgment for respondents in accordance with its opinion (R. 257, 258). In that opinion, as we have just outlined, the Court of Appeals took the position that the tolls are substantially out-of-line with costs and that petitioner's failure to prescribe new tolls constitutes an arbitrary refusal to comply with the statutory requirements of Section 412 of the Canal Zone Code. Since then, the Court of Appeals has indicated that petitioner's compliance with its judgment must result in a very substantial lowering of the Panama tolls.[36] In these circumstances, the District Court presumably will feel constrained to enter a judgment conforming

[36] The memorandum of the Court of Appeals denying a stay of mandate, pending application to this Court for a stay of judgment (R. 259), stated:

> Motion denied. *In view of the heavy accumulating loss to plaintiffs by defendant's failure to perform what this court holds to be its legal obligation* and of the ease with which it can seek interim relief from the Supreme Court or a justice thereof if we are in error, a stay of the mandate to prevent even a beginning in the lengthy steps necessary towards compliance with the court's order is not in the interest of justice.
>
> (S.) CHARLES E. CLARK
> (S.) CARROLL C. HICKS
> U. S. C. J. J.
>
> Dated: April 30, 1957. [Emphasis added.]

very closely to respondents' prayer for summary judgment.[57]

Upon application made in this Court, Mr. Justice Harlan ordered a stay of all further proceedings under the mandate of the Court of Appeals.[58] Having evaluated the questions presented by this litigation as being of such a nature "that it cannot be said that it is unlikely that certiorari will be granted", he took cognizance of the far reaching effect of this litigation on the relations of the United States with foreign governments and concluded that petitioner, as a Government instrumentality, should not be compelled to revamp its entire toll structure before its duty to do so, and the extent thereof, if any, were finally adjudicated. (R. 261–262; 1 L. Ed. 2d 903, 904, 77 Sup. Ct. 854.)

Both sides sought review in this Court, petitioner from the direction of summary judgment in favor of respondents, the latter from the denial of their claim

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[57] *Supra, fn.* 23. Respondents' expectation that an order of this scope will be entered is disclosed by their (Consolidated) Memorandum in Opposition to Petitioner's Application for Stay: "The judgment will undoubtedly direct that the toll rate be proposed on a basis of Canal activity only and without absorption of the business losses as that point was expressly ruled on by Court of Appeals (R. 248–249). *Respondents will confidently argue that it also provides for the allocation formulae used by the General Accounting Office in the light of the provisions of the Government Corporation Control Act* * * * (p. 14)." (Emphasis added.)

[58] The Court of Appeals issued its mandate although advised of the pendency of an application to a Justice for a stay (R. 259).

for a refund. Both petitions were granted on October 14, 1957, and ordered consolidated. (R. 264, 355 U. S. 810.)

SUMMARY OF ARGUMENT

This case presents three separate issues. *First,* whether the courts have jurisdiction to compel the Panama Canal Company to prescribe new and lower tolls for the Canal; *second,* whether the court below properly directed the entry of summary judgment in favor of respondents; and, *third,* whether the courts have jurisdiction to direct a refund of tolls allegedly collected illegally in the past.

I

The courts lack jurisdiction to compel petitioner to prescribe new Canal tolls, for three independent reasons: (A) judicial review is precluded by statute; (B) the duty to prescribe new tolls is committed to agency discretion; and (C) respondents lack standing judicially to challenge the legality of the Canal tolls.

A. Judicial review of Canal toll determination is precluded by statute. Under Section 10 of the Administrative Procedure Act, the courts lack power to review agency action where it is precluded by statute, and such preclusion need not be in specific terms if an intent to forbid judicial review be clear. Here, that intent is to be inferred from four circumstances: (*1*) the statute respondents invoke is concerned with the administration of public property; (*2*) petitioner's administration of the Canal is subject to detailed supervision by President and Congress; (*3*) the

statute amends an earlier one precluding judicial review, and Congress evinced no purpose to change that rule; and (*4*) the statute requires presidential approval of any rate change.

1. Ordinarily, a statute dealing with the administration of public property—such as the Panama Canal—does not, in the absence of specific provision, contemplate judicial review. Congress, when proceeding under Art. IV, Section 3 of the Constitution, acts as a proprietor who issues rules for the use of his own property. *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 474. Any alleged illegality in the administration of these rules is normally to be remedied by President or Congress. Judicial intrusion into this area would disturb the distribution of powers and responsibilities among the three branches of Government. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127–218. Section 4 of the Administrative Procedure Act recognizes this principle.

2. In any case, petitioner is subject to such stringent and comprehensive scrutiny by President and Congress as to preclude judicial review. The President, or his nominee, is petitioner's sole stockholder, and he has full administrative supervision over it. The Government Corporation Control Act also gives the President and Congress complete control over petitioner's fiscal affairs. The President has the power to modify, amend, and revise petitioner's budget; Congress considers the budget and passes the necessary legislation and appropriations. In addition, Congress is informed of petitioner's fiscal affairs

by the annual audit of the General Accounting Office and its review of those matters through annual appropriations negatives judicial review of the same fiscal issues. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 130; *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 931 (C. A. D. C.), certiorari denied, 350 U. S. 884. Judicial review in this area would either duplicate the congressional controls, or subject petitioner to the possibility of conflicting directions, one enforceable by contempt, the other one by impeachment or removal. Cf. *Mississippi* v. *Johnson*, 4 Wall. 475, 501. Congressional hearings and reports, as well as appropriation acts and directives, establish that Congress is, in fact, exercising effectively its function of supervising petitioner's fiscal affairs.

3. The current Canal statute constitutes an amendment of earlier legislation under which judicial review was not available with respect to Canal tolls. The silence of Congress, at the time it amended the legislation, is indicative of an intent to continue this pre-existing state of the law (*Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 303), and statements in the legislative history affirmatively support this view.

The statutory provision subjecting petitioner to suit merely gives the courts jurisdiction over its person; it does not enlarge their jurisdiction over the subject matter. Nor does petitioner's incorporation on commercial lines indicate an intent to subject it to unqualified judicial review of its operations. Petitioner is an agency and instrumentality of the United States created for the purpose of performing gov-

ernmental functions and essential government business (*New York ex rel. Rogers* v. *Graves*, 299 U. S. 401). All activities of validly created government corporations are of a governmental nature; they are not to be wholly assimilated to private litigants because they engage in business activities analogous to those conducted by private enterprise. *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95, 102; *Federal Crop Insurance Corp.* v. *Merrill*, 332 U. S. 380, 383–384. The legislative history relating to an unsuccessful bill introduced in Congress in 1955 indicates that Congress itself considers that petitioner's rate determination cannot be reviewed judicially in the absence of specific statutory authorization.

4. The requirement of presidential approval of petitioner's rate determination likewise precludes judicial review. Prior to presidential approval, petitioner's acts do not constitute final agency action; and the courts lack jurisdiction to render any decision which may be overriden by the Executive. *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103, 112–114. Perhaps more basic is the consideration that administrative action which has to be approved by the President constitutes advice to the President, and the courts do not intrude into that area. *Marbury* v. *Madison*, 1 Cranch 137, 166; *United States* v. *Bush & Co.*, 310 U. S. 371, 379–380.

Nor did petitioner's failure to propose new tolls make its action final, on the ground that there was nothing for the President to approve. The President has the power to compel petitioner to take the necessary steps if he deems it advisable. Courts will not

compel an inferior administrative officer to report to his superior or to send a particular document to him. *Yelvington* v. *Presidential Pardon & Parole Attorneys*, 211 F. 2d 642 (C. A. D. C.); *Updegraff* v. *Talbott*, 221 F. 2d 342 (C. A. 4).

The President's approval of petitioner's toll proposals is obviously a vital and independent element. Petitioner's functions are to compute the tolls as an expert rate-maker. The President is to consider policy matters such as the effect of the proposed tolls on world trade, national transportation policy, and foreign relations. The factor of presidential disapproval or modification cannot be discounted as a remote possibility. It is an integral and significant part of the statutory plan.

B. The courts below also lack jurisdiction of respondents' attempt to compel petitioner to prescribe new tolls because (1) petitioner's duties with respect to rate determinations are discretionary, and (2) in any event the only federal courts which have jurisdiction to compel official action are those located in the District of Columbia.

1. (*a*). Section 10 of the Administrative Procedure Act exempts duties committed to agency discretion from judicial review because, under our system of separation of power, courts cannot reexamine matters which have been entrusted to the discretion or the judgment of the Executive or of administrators. In particular, official action may be judicially compelled only in those instances where an official fails to perform a purely ministerial duty (*Marbury* v. *Madison*,

1 Cranch 137, 166; *Decatur* v. *Paulding*, 14 Pet. 497, 514–517), *i. e.*, when it is so plainly prescribed as to be the equivalent of a positive command. *Wilbur* v. *United States*, 281 U. S. 206, 218–219. The interpretation of a statute is frequently among the duties entrusted to agencies' discretion (*Decatur* v. *Paulding*; 14 Pet. 497, 515), and the courts will normally review an administrative interpretion in order to compel action only where the interpretation is clearly erroneous. *United States ex rel. Chicago Great Western R. R. Co.* v. *Interstate Commerce Commission*, 294 U. S. 50, 63. Judicial review by way of mandamus is not equivalent to a writ of error, *Work* v. *Rives*, 267 U. S. 183.

Moreover, rate determinations—the subject of this case—are typical of agency action basically committed to agency discretion. *New York* v. *United States*, 331 U. S. 284, 335. They require specialized knowledge, information and experience, and are not entirely susceptible of strict proof or disproof; the courts do not have the aptitude, facilities, or responsibility to reexamine such decisions for themselves. *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103, 111; *Chicago, B. & Q. Ry. Co.* v. *Babcock*, 204 U. S. 585, 598; *Williamsport Wire Rope Company* v. *United States*, 277 U. S. 551, 559. Constitutional courts, at best, can reexamine specific issues of law or findings of fact which are arbitrary, capricious, or not supported by the evidence. *Keller* v. *Potomac Electric Co.*, 261 U. S. 428, 440–444; *Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 275–276. The use of the permissive word "authorize" in

Section 411 of the Canal Zone Code, in contrast with other clearly mandatory language throughout the Code, indicates that Congress is fully aware of the discretionary nature of petitioner's toll-determining duties.

(*b*). In this case respondents complain of three matters, all involving the exercise of such judgment and discretion. The determination of what constitutes an "appropriate share" of the cost of the Canal Zone Government, within the meaning of Section 412, and the allocation of petitioner's overhead, are clearly such problems committed to petitioner's discretion and business judgment. Petitioner's failure to increase the cost of the goods and services sold by its supporting business activities is likewise an exercise of its considered business judgment, because an increase in those charges might have priced the activities out of business, or might result in the elimination of employee's fringe benefits, with the result that wage increases might be required (which would, of course, raise the cost of operating the Canal).

As for petitioner's allocation of the costs of the Canal Zone Government between the Canal and the supporting business activities, its position is that the allocation is correct and, in any event, a matter entrusted to its discretion, subject to Congressional oversight. The deficit of these business activities constitutes a part of the "costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto," and is therefore recoverable through tolls under Section 412

This interpretation is fully supported by the statutory language, plan, and history, and especially by Section 246 (c) of the Canal Zone Code, *infra*, p. 165. The notion that under the Code the Canal tolls must be lowered, and that a part of the costs of petitioner's operations should be paid by federal taxpayers out of appropriated funds, runs completely counter to the financial purposes Congress sought to accomplish with the enactment of the 1950 statute under which respondents claim.

2. In any event, the District Court for the Southern District of New York, in which this action was instituted, lacks jurisdiction to maintain these proceedings which in effect seek an original writ of mandamus. This Court early interpreted the Judiciary Act of 1789 as withholding from the federal courts outside the District of Columbia the power to grant the prerogative writs, unless they were expressly authorized to do so. *McIntire* v. *Wood*, 7 Cranch 503, 504; *Covington & Cincinnati Bridge Co.* v. *Hager*, 203 U. S. 109. These rulings have never been repudiated by this Court; the lower federal courts have adhered to them to this day; they have not been affected by Rule 81 (b) of the Federal Rules of Civil Procedure, the 1948 revision of Title 28 of the United States Code, or the Administrative Procedure Act. *Blackmar* v. *Guerre*, 342 U. S. 512, 515–516; *Aktiebolaget Bofors* v. *United States*, 194 F. 2d 145, 149 (C. A. D. C.). Congress is fully aware of this state of the law. Whenever it wishes that a specific statute be enforced throughout the country in proceedings in the nature

of mandamus, it expressly confers that power. In these circumstances any change of the rule in *McIntire v. Wood*, *supra*, should come from Congress. *Missouri v. Ross*, 299 U. S. 72, 75. Respondents are not left without a remedy, if they are so entitled. The office of petitioner's Secretary is located in the District of Columbia, which is an available forum for granting mandatory relief.

The District Court's lack of jurisdiction to grant mandatory relief cannot be cured by a prayer for a mandatory injunction or for declaratory relief. A long line of decisions of this Court, beginning with *Gaines v. Thompson*, 7 Wall. 347, has established that mandamus and mandatory injunctions are legal equivalents, subject to the same rules and limitations. *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515, does not depart from this rule; it reaffirms it (at p. 551). Nor is the request for declaratory relief of any avail. Such relief presupposes that the federal courts have jurisdiction to award final relief of the older types. A court which cannot grant mandatory relief cannot avoid that limitation simply by "declaring" the rights of the parties. *Marshall v. Crotty*, 185 F. 2d 622 (C. A. 1).

C. Finally, respondents lack standing to challenge, in court, petitioner's administration of the toll formula.

1. Prior to the Administrative Procedure Act, standing-to-sue required either the violation of a "legal right" which is more than a mere financial interest, or a statutory review procedure in which a

person adversely affected was authorized to challenge its legality. *Tennessee Power Co.* v. *Tennessee Valley Authority*, 306 U. S. 118; *Federal Communications Commission* v. *Sanders Radio Station*, 309 U. S. 470; *Associated Industries* v. *Ickes*, 134 F. 2d 694 (C. A. 2), vacated as moot, 320 U. S. 707. The legislative history of the Administrative Procedure Act indicates that Section 10 (a) of that Act was designed to continue this distinction. There is no indication that Congress intended to confer standing on every person financially affected by administrative action, and thereby to open "a vista of litigation hitherto unrevealed." Cf. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 480–481. This interpretation of the Procedure Act is supported by the 1952 Fulbright Amendment to the Walsh-Healey Public Contracts Act of 1936. *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924 (C. A. D. C.), certiorari denied, 350 U. S. 884; cf. *Ruth Elkhorn Coals, Inc.* v. *Mitchell*, 248 F. 2d 635 (C. A. D. C.), pending on petition for a writ of certiorari, No. 704, this Term.

2. Admittedly, the Canal Zone code does not authorize a proceeding for judicial review by a person adversely affected. Respondents accordingly have standing to sue only if they can complain of the violation of a "legal right." Even assuming that respondents would have a "legal right" here if they would have a remedy against a private person in similar circumstances (cf. *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 152 (concurring opinion of Frankfurter, J.)), there is no corresponding private remedy upon which respondents could

rely. At common law, a user could collect from a utility a refund of the amount actually paid (in the past) in excess of the reasonable rate, but respondents (on this aspect of the case) seek a prospective lowering of the tolls, a remedy which is not available at common law, and not damages or reparations. Moreover, respondents' complaint is not that petitioner charges an unreasonable rate, but that it does not prescribe the tolls according to the statutory formula; and the toll formula deviates in many respects from a "reasonable rate" as defined by this Court. Also, in the case of a *statutory* rate determination, the normal rule is that the user of the utility must rely upon such remedies as the statute provides—remedies which are not for the benefit of the user alone, but for the public at large. Common law remedies are superseded by the statute, and the user has no standing to challenge a rate determination in the absence of a statutory procedure authorizing review by a user. *City of Atlanta* v. *Ickes*, 308 U. S. 517; *Associated Industries* v. *Ickes*, 134 F. 2d 694 (C. A. 2), vacated as moot, 320 U. S. 707; *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924 (C. A. D. C.), certiorari denied, 350 U. S. 884.

Viewed against its background and in this context, the 1950 amendment to the Canal Zone Code did not create in respondents a "legal right" to have the tolls computed according to the toll formula there set forth. Cf. *Chicago Junction Case*, 264 U. S. 258, 266–267. In particular, absent specific provisions, statutes regulating the use of public property ordinarily create privileges not enforceable by judicial action. Official

duties in this area are owing not to the user, but to the Government; only the official's superior and Congress may complain if he violates them. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113. See also *supra*, pp. 30–31.

Nor does the clause of the Hay-Pauncefote Treaty in which the United States agreed that the toll charges for the use of the Canal would be "just and equitable" confer an actionable right upon respondents. First, respondents do not seek "just and equitable" but statutory tolls. Moreover, treaty obligations of the United States do not create judicially-enforceable rights in American citizens. *Skiriotes* v. *Florida*, 313 U. S. 69.

II

1. The Court of Appeals erred in directing the entry of summary judgment in respondents' favor. The decision of the District Court disposed of petitioner's motion to dismiss for lack of jurisdiction. At that time, respondents had made a motion for summary judgment which, however, had been stayed to enable the court first to pass on the jurisdictional issue. Relying on the stay, petitioner did not answer the motion for summary judgment. The grant of that motion by the court below deprived petitioner of its fundamental right to answer on the merits. *Fountain* v. *Filson*, 336 U. S. 681.

2. A proper disposition of the case if the merits are reached would be to dismiss it on the merits. Congress was notified of the dispute between petitioner and the Comptroller General in May 1955. Since

then, fully advised of this controversy, it has passed three appropriation acts based upon petitioner's interpretation of its obligations under the statutory toll formula. It can therefore be said that Congress has, in effect, ratified petitioner's construction of the statute. *Fleming* v. *Mohawk Co.*, 331 U. S. 111; *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535. For this reason, the proceedings should be dismissed, rather than remanded. *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282; *Myers* v. *Bethlehem Corp.*, 303 U. S. 41. In addition, we submit that, if the Court were to consider the issue for itself, it would hold that petitioner's interpretation of the toll formula is not only reasonable but is correct.

III

Both lower courts correctly held that they lacked jurisdiction to entertain respondents' claim for a refund of the alleged illegal tolls collected in the past. The common law remedy of reparation is not available to respondents. They do not seek the return of rates collected in excess of reasonable ones, but damages on the ground that petitioner did not comply with the statutory formula. Respondents seek a statutory benefit; they are therefore bound by the terms of the statute. *Z. & F. Assets Corp.* v. *Hall*, 311 U. S. 470. And the statute expressly precludes judicial reparations proceedings. It provides that the tolls are to be determined by the President, not by the courts, and that they remain in effect until changed by the President; retroactive changes are not permissible under the statute. Moreover, the President is an indispensable party to any attempt to

interfere with his toll-determining authority. Since he cannot be joined, the proceedings must be dismissed. *Mine Safety Appliances Co.* v. *Forrestal,* 326 U. S. 371.

Even if the courts would have jurisdiction, any award of reparations would require a judicial determination of the tolls which the President would have approved if petitioner had performed its duty. This task, we submit, is not of a justiciable nature. The court would first have to determine the toll rate on the basis of the toll formula which contains many discretionary elements, and, second, would have to evaluate the course the President would have taken on the basis of the policy decisions—commercial, military, diplomatic—left to him by the statute. This obviously is not a task for the judiciary. *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.,* 333 U. S. 103.

ARGUMENT

From the time the concept of the Panama Canal became a reality, the problem of its tolls has engaged the direct attention of the President, of Congress, and of foreign nations. A multitude of interests and a complex of factors—commercial, international, defense, transportation, fiscal—have constantly borne in on this problem, and been weighed and reweighed. The courts have played no role at all in these considerations. Now, for the first time, respondents seek to inject the courts into this sensitive area directly affecting the functioning of one of the world's great international waterways—a major facility belonging to the Federal Government—and by judicial

action to compel the Government to lower the tolls for both domestic and foreign ships. As we shall show, there are several legal barriers to this result, but perhaps the crucial factors are the nature and history of the Panama Canal toll problem which infuse almost every legal issue in the case.

I

THE COURTS LACK JURISDICTION TO COMPEL PETITIONER TO LOWER THE TOLLS FOR THE USE OF THE PANAMA CANAL

Our primary position is that the courts lack authority to control or review petitioner's functions "to prescribe * * * the tolls that shall be levied for the use of the Panama Canal."[39] There are three reasons for this position: *first,* the statutory plan clearly indicates a congressional purpose to preclude judicial review; *second,* petitioner's duties with respect to the determination of new tolls are by law committed to executive discretion; and, *third,* respondents, alleging merely a financial loss, lack the requisite standing to challenge any supposed violation by petitioner of its statutory duties which are owed to the President and Congress.

[39] According to Section 411, *supra,* pp. 3–4, petitioner's functions in "prescribing" new tolls consist of the following steps: (1) the determination that new tolls are appropriate; (2) the giving of six months' notice in the Federal Register; (3) the holding of a public hearing; and (4) the submission of the matter to the President for approval.

A. JUDICIAL REVIEW OF PETITIONER'S ACTIVITIES RELATING TO THE DETERMINATION OF THE CANAL TOLLS IS PRECLUDED BY STATUTE

1. *The preclusion of judicial review need not be in express terms.* According to the introductory clause of Section 10 of the Administrative Procedure Act (*supra*, p. 6), the courts lack authority to review agency action where such review is precluded by statute. The Canal Zone Code, it is true, does not provide in so many words that petitioner's actions with respect to the determination of the Canal tolls are exempt from judicial review. The Administrative Procedure Act, however, does not require that judicial review be precluded *in haec verba*. While original drafts of the Act (S. 7 and H. Rep. 1203, 79th Cong., 1st Sess.) required that the statute *expressly* preclude review, the adverb "expressly" was eliminated during the legislative deliberations. This omission indicates that judicial review may be precluded by implication.[60]

The legislative history of the Administrative Procedure Act discloses that Congress so understood Section 10. The House Report clearly recognizes that a statute need not be specific in withholding judicial review but that in such event it "must upon its face give clear and convincing evidence of an intent to withhold it." [61] Again, when Representative Walter

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[60] See *Air Line Dispatchers Ass'n.* v. *National Mediation Bd.*, 189 F. 2d 685, 688, fn. 1 (C. A. D. C.), certiorari denied, 342 U. S. 849.

[61] H. Rept. 1980, 79th Cong., 2d Sess., p. 41. *Legislative History of the Administrative Procedure Act*, S. Doc. 248, 79th Cong., 2d Sess., p. 275. See also *Heikkila* v. *Barber*, 345 U. S. 229, 232.

explained the provisions of the Act on the floor of the House, he stated:

> Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing, and unmistakable under the bill.[62]

Of similar importance is the weight given by Congress to the comments of the Attorney General on Section 10,[63] in which he took the position that the Section did not overrule decisions such as *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, which hold that the congressional intent to preclude judicial review need not be expressed but can be inferred from the contents and context of the statute.[64]

2. *The Canal Zone Code discloses a clear intent that the determination of the Canal tolls shall not be subject to judicial review.* The legislative purpose to preclude judicial review of the fixing of the Canal tolls is manifested in the following ways: *first*, the statute deals with the administration of property of the United States, normally reserved to supervision by Congress

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[62] 92 Cong. Rec. 5654, *Legislative History of the Administrative Procedure Act*, *supra*, fn. 61, p. 368.

[63] See *Legislative History of the Administrative Procedure Act*, *supra*, fn. 61, pp. 229–230 (Attorney General's Comments Annexed to Senate Report) and p. 413 (comments read into the Congressional Record as extension of remarks by members of the House of Representatives). See also *infra*, pp. 110–111.

[64] *American Stevedores* v. *Porello*, 330 U. S. 446, 452, points to the weight to be given to comments of the Attorney General on pending legislation when such communications are incorporated in congressional reports.

and the President to the exclusion of the judiciary; *second,* the two political branches do, and were intended to, extensively supervise petitioner's operations; *third,* prior to the 1950 amendment of the Canal Zone Code there was no judicial review of the President's rate determinations, and the 1950 legislation did not contemplate any change in this aspect of the machinery of prescribing the Canal tolls; and, *finally,* the statute requires presidential approval of any changes in the Canal tolls.

a. *The fact that the statute is concerned with the administration of United States property is indicative of an intent to preclude judicial review.* Respondents' claim is based upon Sections 411 and 412 of Title 2 of the Canal Zone Code (*supra,* pp. 3–6).[65] This legislation is concerned with the administration of, and the conditions under which the public may use, the Panama Canal, a most significant property of the United States. Sections 411 and 412 do not represent an exercise by Congress of its regulatory powers under Article I of the Constitution. The authority to enact them is derived from Article IV, Section 3, pursuant to which Congress has the power to make all needful rules and regulations respecting the property of the United States.

While there may be a strong presumption that Section 10 of the Administrative Procedure Act was designed to expand somewhat the availability or scope of judicial review in the case of administrative action

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[65] Complaint, par. 5 (R. 5); affidavit in support of motion for summary judgment, par. 3 (R. 13–15).

impinging upon the personal and property rights of individuals (*Heikkila* v. *Barber,* 345 U. S. 229, 232; *Shaughnessy* v. *Pedreiro,* 349 U. S. 48, 51), such considerations are less applicable in the area of the management of the public property. Here, as Representative Walter stated when explaining the Administrative Procedure Act on the floor of the House of Representatives, "the Government is in the position of an individual citizen and is concerned with its own property, funds, or contracts".[88] This concept has found expression in the opening clause of Section 4 of the Administrative Procedure Act (*infra,* p. 170) which exempts "any matter relating to * * *. public property" from the requirement of Section 4 (d) that "Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule".

This express provision gives clear guidance to the disposition of the present litigation. The gist of respondents' complaint is to compel petitioner to prescribe new tolls (R. 8), *i. e.,* to issue a "rule" as defined in Section 2 (c) of the Administrative Procedure Act (*infra,* p. 170). The withholding of the relatively weak privilege of "petition" in the area in which the Government deals "with its own property, funds, or contracts" is indicative of a congressional purpose to deny the far more potent remedy of judicial review. This part of Section 4 is a manifestation of the general principle that, where the Government is in the position of a private citizen, administrative action is normally

[88] 92 Cong. Rec. 5650; *Legislative History of the Administrative Procedure Act, supra,* fn. 61, p. 358.

subject to congressional and executive, not judicial, review.

The reason is that legislation, such as Sections 411 and 412, enacted pursuant to Art. IV, Section 3 of the Constitution, differs essentially from the more customary exercise by Congress of its regulatory authority. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 128. Statutes enacted under the former power are not considered to be "of a legislative character in the highest sense of the term (Art. 4, § 3) 'but savor somewhat of mere rules prescribed by an owner of property'." *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 474; *Butte City Water Co.* v. *Baker*, 196 U. S. 119, 126. In this area, Congress is considered to have the status not merely of a legislator but also that of a proprietor (*United States* v. *Midwest Oil Co., ibid.*; *Light* v. *United States*, 220 U. S. 523, 536), and Congress has the special constitutional function of disposing of, and administering, the property of the United States. *Alabama* v. *Texas*, 347 U. S. 272, 273; *United States* v. *San Francisco*, 310 U. S. 16, 29–30; *Light* v. *United States*, 220 U. S. at 537.

Any alleged illegality in the administration of Sections 411 and 412 of the Canal Zone Code thus is to be remedied by Congress, or by petitioner's administrative superiors under the "take care" clause of Art. II, Section 3 of the Constitution, not by the courts. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 130. As this Court held in *Lukens Steel Co.*, at pp. 127–128, "judicial restraint" upon the executive in this area "would constitute a break with settled judicial practice and a departure into fields hitherto

wisely and happily apportioned by the genius of our polity to the administration of another branch of Government".

b. *The stringent controls of the executive and legislative branches over the Panama Canal Company, and in particular its financial affairs, preclude judicial review.* The Panama Canal Company has in fact been subject to such stringent effective and current supervision by President and Congress, especially in the field of its financial affairs, as to negative the possibility of judicial review. Such review would either be redundant or would subject the petitioner to conflicting direction by the legislative and judicial branches.

Executive and legislative control over the affairs of the Panama Canal Company is derived essentially from two sources: Sections 246 (a) and 247 of the Canal Zone Code (*infra*, pp. 148–149, 151–152), and the Government Corporation Control Act. Under the former, all of petitioner's stock is held by the President, or his designee, the Secretary of the Army,[27] who appoints petitioner's directors to hold office at his pleasure. As this Court pointed out in *Humphrey's Executor* v. *United States*, 295 U. S. 602, 629, "one who holds office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will". The President thus has general and plenary supervisory powers over petitioner's affairs. Congress obviously expected him to exercise them. See also *infra*, pp. 61–70.

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[27] H. Doc. 160, 84th Cong., 1st Sess., p. 4 (R. 45, R. 171).

As for the financial affairs of the Panama Canal, presidential and congressional controls are even more detailed. Pursuant to Sections 102–104 of the Government Corporation Control Act (59 Stat. 598, 31 U. S. C. 847–849), petitioner[68] prepares an annual business-type budget which is submitted to the Bureau of the Budget, an establishment in the Executive Office of the President (31 U. S. C. 16). The President, who has the power to modify, amend, and revise this budget, transmits it to Congress which, in turn, considers it and passes the necessary legislation and appropriations. The purpose of these requirements and of the annual commercial type audit by the General Accounting Office (*supra*, p. 18, fn. 47) is expressed in Section 2 of the Government Corporation Control Act, 59 Stat. 597, 31 U. S. C. 841, *viz.*, "to bring Government corporations and their transactions and operations under annual scrutiny by the Congress and provide current financial control thereof". The statute thus entrusts *Congress and the President* with the current scrutiny of petitioner's financial affairs.

The congressional review of the petitioner's finances through the power of annual appropriations is exclusive, and precludes review of the same fiscal issues by the courts. In *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 931 (C. A. D. C.), certiorari denied, 350 U. S. 884, a case involving ac-

[68] As already noted, petitioner is subject to the Government Corporation Control Act. Cf. Section 101, 59 Stat. 597, as amended by the Act of September 26, 1950, § 2 (a), 64 Stat. 1038, 31 U. S. C. 846, *supra*, p. 11.

tivities over which "Congress had reserved for itself control * * * through the power of making annual appropriations for the executive departments affected", the court held that "The continuance of defendants' activities here complained of is therefore subject to review by Congress acting each year on the appropriations sought by the defendants. It is not—under the controlling precedents—subject to review by the courts". This ruling is merely a restatement of the holding of this Court in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 130 (*supra*, pp. 48–49) that Congress' annual control over the financial and fiscal affairs of the Government makes judicial review in that area both unnecessary and undesirable.[39]

The injection of judicial review into the intricate field of the Government's fiscal legislation for the Panama Canal, moreover, would lead to confusion and possible conflict. Where Congress and courts agree, no harm would be done except a wasteful duplication of effort. In the case of disagreement, on the other hand, the courts and Congress may subject petitioner to conflicting directions, one enforceable by impeachment or removal, the other one by citation for contempt. Considerations of this type caused this Court to disclaim jurisdiction in *Mississippi* v. *Johnson*, 4 Wall. 475, 501.

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[39] "The power of Congress to make annual appropriations does not, of course, preclude judicial review of all of the activities of the executive. It is normally exclusive, however, in the financial and fiscal field, *i. e.*, the area under specific congressional scrutiny in connection with the appropriations acts.

The court below sought to refute this argument by proclaiming that the courts remain open "for the person unable to get redress from the busy legislature or White House" (R. 256).[70] However, the enactment of an appropriation act, approving a budget based on the present tolls, when Congress was advised of the controversial administrative fiscal action (see *infra*, pp. 136–138) indicates approval of the administrative action, not congressional inertia. *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 544–545, fn. 12; *Brooks* v. *Dewar*, 313 U. S. 354, 361; *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 116, 119; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 308–315. The silence of Congress may thus be just as meaningful as an express directive in an appropriation act. In such circumstances, an attempt by the courts to take jurisdiction because Congress failed to take action would amount to a judicial reexamination and possible overruling of a congressional ratification. Nor can it be said that the doctrine of ratification by appropriation is a convenient, but unrealistic, fiction with respect to fiscal matters. The reasoning of the court below implies that the Budget and Accounting Act of 1921 and the Government Corporation Control Act are failures, and that Congress is either

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[70] The court did not explain the source of its power to act. The President, of course, supervises the activities of his subordinates by virtue of the "take care" clause of Art. II, Section 3 of the Constitution. The congressional authority to scrutinize the fiscal affairs of the executive branch flows from its appropriation power (Art. I, Section 9, Clause 7 of the Constitution). The courts, however, do not have a general visitatorial power over the executive (see *infra*, pp. 72, 101).

unable or unwilling to perform its constitutional duty of controlling the financial transactions and operations of the executive branch. Such a breakdown of our political system cannot be readily assumed.

As a matter of fact, the very experience of the Panama Canal Company discloses that its fiscal affairs are subject to detailed and effective congressional scrutiny. The Conference Report on the Civil Functions Appropriations Bill, 1954 (H. Rept. 889, 83d Cong., 1st Sess., p. 10) contained directives to the Panama Canal Company to submit studies on the compensation paid workers in the Canal Zone, and on the *adequacy*—not the excessiveness—of the tolls charged vessels using the Canal. The study submitted in response to the latter directive may be found at 100 Cong. Rec. (Daily Ed.) A1995 (*infra*, pp. 173–179). When petitioner sought to abandon the Panama Railroad, Congress objected [71] and petitioner finally agreed to keep the railroad in operation.[72] Similarly, the congressional committees in charge of legislation and appropriations concerning the Panama Canal have been kept fully advised concerning the dispute at bar.[73]

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[71] H. Rept. 2076, 84th Cong., 2d Sess., p. 10; S. Rept. 2039, 84th Cong., 2d Sess., p. 7; H. (Conference) Rept. 2344, 84th Cong., 2d Sess., pp. 3, 6; H. Rept. 2974, 84th Cong., 2d Sess., p. 9.

[72] H. Doc. 210, 85th Cong., 1st Sess., pp. 28–29. For other instances of the detailed control exercised by Congress over petitioner, see H. Rept. 1345, 83d Cong., 2d Sess., p. 12; S. Rept. 1373, 83d Cong., 2d Sess., p. 26; H. Rept. 603, 84th Cong., 1st Sess., p. 10.

[73] For details, see *supra*, pp. 20–22, and *infra*, pp. 136–137.

c. *The 1950 amendment which did not expressly authorize judicial review was not designed to modify the pre-existing statutory plan under which judicial review was precluded.*

(*1*). Ordinarily, with respect to a regulatory statute, the mere failure expressly to provide for judicial review does not preclude review. *Stark* v. *Wickard*, 321 U. S. 288; *Heikkila* v. *Barber*, 345 U. S. 229, 233.[74] Sections 411 and 412 of the Canal Code, however, are not new and original legislation; nor do they deal with a regulatory problem. They constitute an amendment of the earlier provisions governing the determination of the Canal tolls. In these circumstances, the earlier availability of judicial review becomes highly material. And prior to 1950, the President alone was charged with the determination of the Canal tolls.[75] There is no question that his actions were not subject to judicial review. The 1950 amendments are silent on the issue of review. Against this background, "we cannot help but believe that if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say on any aspect of the problem, it would have made its desire plain". *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, at p. 303.

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[74] See also *Legislative History of the Administrative Procedure Act*, S. Doc. 248, 79th Cong., 2d Sess., p. 275. "The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review"; see also *id.* at p. 368.

[75] For the pre-1950 version of Sections 411 and 412, see 48 U. S. C. (1946 Ed.) 1315.

Moreover, none of the purposes sought to be accomplished by the 1950 amendment requires the injection of the judiciary into the problem of the Panama Canal tolls. The principal specific objectives of the 1950 legislation were (a) to streamline the administration of the Panama Canal, to put it on a businesslike basis; and (b) to avoid an increase of the Canal tolls to $1.40 per ton (*supra*, pp. 14–15). Neither of these purposes requires, implies, or is dependent upon the availability of judicial review, or a departure from the pre-existing statutory plan placing the Panama Canal, like most Government-owned property, under the exclusive control of the President and Congress.

The legislative history of the Act indicates that this, indeed, was the type of supervision anticipated by those who drafted the 1950 statute. Mr. Seidman, an official of the Bureau of the Budget, testified:

> * * * review and approval of the rate by the President is believed essential. The Congress will, of course, have an opportunity to examine tolls policy in connection with its review of the business-type budget to be submitted annually by the Company.[76]

Similarly, the debate on the floor of the House of Representatives discloses a congressional desire that "matters of policy will be controlled by the Congress through the annual budget submitted to the Congress under the Government Corporation Control Act of

[76] *Maintenance and Operation of the Panama Canal*, Hearings before a Subcommittee of the Committee on Armed Services, United States Senate, 81st Cong., 2d Sess. on H. R. 8677, p. 7 (R. 109).

1945" (96 Cong. Rec. 13372), and that "Congressional management of the entire undertaking will not be lessened in the slightest" (96 Cong. Rec. 13376). "Congressional management" would, of course, be lessened if the courts could independently review petitioner's rate determinations. It is clear that the 1950 Congress did not contemplate any such diminution of the plenary control by President and Congress.

(2). That petitioner may be sued is no indication of a congressional purpose to provide for judicial review where none existed before. Petitioner is a corporation and corporations are generally made suable. The waiver of sovereign immunity merely means that the courts have jurisdiction over the person of petitioner. Where the courts also have jurisdiction over the subject matter of the litigation, recovery is not to be defeated by petitioner's governmental nature or origin. Suability does not, however, confer upon the courts jurisdiction over the subject matter in areas in which Congress always has claimed to have the last word.

Nor can it be said that petitioner's incorporation on commercial lines, designed to operate like an ordinary business enterprise, reveals a legislative purpose to subject the determination of the Canal tolls to judicial review. In the first place, the premise of the argument—that Congress intended petitioner to have for all purposes the status of an ordinary commercial corporation—is fallacious. Petitioner is an agency and instrumentality of the United States; it is endowed with important aspects of the sovereignty of the United States, including priority in the payment

of debts out of bankrupt estates; and it is subject to budgetary restrictions under which no truly commercial enterprise could operate (Canal Zone Code, Title 2, Sections 245–249, *supra*, pp. 11–12, and *infra*, pp. 148–154, 164–166). This Court held, in 1937 in *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401, 406–408, that the "creation, management and operation of the [Panama] canal are all governmental functions" and that the then Panama Railroad Company, petitioner's corporate predecessor, was a federal instrumentality engaged essentially in government business. At that time, the Panama Railroad Company was still a New York corporation, originally organized as a commercial enterprise, whose stock had been acquired by the Government. It was not then subject to the detailed surveillance of the Government Corporation Control Act, and it carried out solely the various supporting business operations (*supra*, pp. 9–10 and fn. 13). Since then, the Panama Railroad Company has been brought under the Government Corporation Control Act, it has been reincorporated under federal law, and renamed and charged with the "governmental function" (*supra*) of maintaining and operating the Canal. The reasoning supporting the 1937 holding of this Court that petitioner is a federal instrumentality, engaged essentially in Government business, has been much strengthened by this intervening legislation.

Moreover, the argument that Congress sought to subject petitioner's rate-making functions to judicial review because these activities are of a commercial, non-governmental nature, ignores the well-established rulings that, as far as the Federal Government is con-

cerned, all activities of validly created Government corporations are of a governmental nature. *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95, 102; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 477; *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 523–524. The circumstance that the Government engages directly, or through a Government corporation, in business activities analogous to those usually conducted by private enterprise does not mean that the Government agency or corporation may be treated exactly as if it were a private litigant. *Federal Crop Insurance Corp.* v. *Merrill*, 332 U. S. 380, 383–384. To assimilate Government activities of a business nature with those of private commercial enterprises, indifferent to the status of such organizations as primarily agencies and instrumentalities of the United States, necessarily construes the law "through the distorting lenses of inapplicable legal doctrine". Cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 144.

Actually, one prime inference to be drawn from the fact that the Government manages its property like a private individual is the very opposite of the conclusion reached by respondents and the court below. Such activities presumptively are subject to exclusive control by the political branches of the Government, and judicial review is precluded (*supra*, pp. 48–49). Except where some statute specifically provides for court scrutiny or the common law allows a reparation suit for past "unreasonable" utility rates (see *infra*, pp. 121–123; 140–143), prices charged by a private person are *not* normally subject to lowering

by a court, at the instance of a buyer, as out-of-line with proper pricing or cost requirements.

(3). The post-legislative history of Sections 411 and 412 of the Canal Zone Code likewise discloses congressional awareness that petitioner's toll determinations are not now subject to judicial review. In June 1955, a bill (S. 2167, 84th Cong., 1st Sess.) was introduced in the Senate which, among other things, would have amended Section 411 by conferring upon the Court of Appeals for the Second Circuit exclusive jurisdiction to review the acts of petitioner under that section, *i. e.*, the prescription of tolls and rules for the measurement of vessels, and to compel corporate action unlawfully withheld or unreasonably delayed.[77] The author of the bill (Senator Magnuson, 101 Cong. Rec. 7713) apparently felt it necessary specifically to provide for judicial review in the view that such scrutiny did not then exist. The Committee Report, presented by Senator Magnuson (S. Rep. 2375, 84th Cong., 2d Sess., p. 1), supports that inference. It concedes (at p. 23) that normally the fees and tolls charged by Government agencies are not reviewable by the courts. It felt, however, that petitioner's toll determinations were so closely linked with the public interest that they should be made subject to judicial review. The report pointed out that the proposed bill contained certain procedural elements designed to make judicial review technically possible, referring presumably to

[77] *Panama Canal (Changes in Administration)*, Hearings before the Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 84th Cong., 2d Sess. on S. 2167, p. 4.

the requirement that the toll hearing be conducted in accordance with the Administrative Procedure Act so as to avoid the criticism that judicial review would not be feasible in the absence of an administrative record.[78] The report added (at pp. 23–24) that its decision to provide for judicial review was decisively influenced by the fact that Mr. Chandler of the Administrative Office of the United States Courts had reviewed with Chief Judge Clark of the Court of Appeals for the Second Circuit the question whether petitioner's toll determinations could be made subject to judicial review and that Mr. Chandler had advised the committee that the court and his own office had "no objection to this portion of the legislation and believe that the question of an appeal procedure is one for the Congress to determine".[79]

While the committee reported favorably on S. 2167, the bill never came to a vote in the Senate,[80] and it died with the adjournment of the 84th Congress.

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[78] See, *e. g.*, *Panama Canal (Changes in Administration)*, *supra*, fn. 77, pp. 12–13.

[79] Mr. Chandler originally had advised the Committee that the provision "undertakes to give to a court functions which do not belong to it and which by its nature it is not adapted to perform effectively". *Panama Canal (Changes in Administration)*, *supra*, fn. 77, pp. 12, 13. See, in this connection, *Keller* v. *Potomac Electric Co.*, 261 U. S. 428; *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464, holding that a constitutional court such as the Court of Appeals for the Second Circuit cannot review discretionary rate determinations. Cf. *infra*, p. 75. For Mr. Chandler's later advice, see *Panama Canal (Changes in Administration)*, *supra*, at p. 173.

[80] 102 Cong. Rec. 11541, 12791, 13901. The discussion of the bill on the floor of the Senate at the time of its introduction indicates that there was considerable opposition to it. 101 Cong. Rec. 7742–7747.

d. *The requirement of presidential approval of the Canal tools precludes judicial review.* Another significant factor showing the exclusion of court review is the specific requirement of Section 411 that changes in rates of tolls shall be subject to, and take effect upon the approval of, the President of the United States, "whose action in such matter shall be final and conclusive". The procedure for change in tolls set out in Section 411 contains the following steps: first, petitioner determines that toll changes are required; second, petitioner gives six months' notice of the proposed changes by publication in the Federal Register; third, petitioner conducts a public hearing; and, fourth, the President approves changes in the tolls. The statute does not specify whether petitioner has the power to change its proposals on the basis of the hearing, or whether the President bases his action upon the petitioner's proposal, the record of the hearings, and such other factors (especially in the field of foreign relations and national transportation policy) as are known to him. If the latter interpretation of the statute is the correct one—if the evaluation of the post-proposal hearings is left completely to the President—petitioner's functions in the determination of the toll rates are of a minor and preliminary nature. We shall assume, however, that petitioner may modify the originally-proposed toll rates on the basis of the facts ascertained at the hearing, and submit those amended figures to the President for approval. In either case, petitioner's functions would be in the nature of advice to the President. And it is settled

that the courts neither review advice given to the President, nor compel an agency to give such advice.

(*1*). The reasons for the refusal of the courts to enter into an area of administrative action which is subject to presidential approval were re-examined several terms ago by this Court in *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103. There, the Court held that those rulings of the Civil Aeronautics Board, an independent agency, which require presidential approval are not reviewable by the courts, despite the fact that the statute in general terms subjects all the decisions of that Board to judicial scrutiny. We submit that this result applies even more cogently to the activities of an agency in the executive branch of the Government,[81] where the statute does not even purport to make judicial review available.

Among the reasons for judicial non-interference in this area, as set forth in the *Waterman* case (333 U. S. at 112–114), are, first, that, prior to presidential approval, the administrative action does not grant any privilege or deny any right. Accordingly, it is not subject to judicial review because the latter presupposes "final" administrative action, *i. e.*, one which imposes an obligation, denies a right, or fixes some legal relationship.[82] The second ground is that the

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[81] *Morgan* v. *Tennessee Valley Authority*, 115 F. 2d 990, 993–994 (C. A. 6), certiorari denied, 312 U. S. 701, holds that the Tennessee Valley Authority, an agency charged with duties very similar to those of the Panama Canal Company, "is predominantly an administrative arm of the executive department".

[82] Cf. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 131; Administrative Procedure Act, Section 10 (c), *infra*, p. 171.

federal courts lack jurisdiction to render decisions which may be overridden by the executive branch.[83] The decision also rests on the general reluctance of the courts to review administrative decisions involving prophesy, specialized knowledge, information and experience, particularly in the area of the foreign relations (333 U. S. at 111–112). Perhaps even more basic is the consideration that administrative action which requires presidential approval constitutes, in effect, advice to the President, and any judicial intrusion into the intimate relationship between the President and his advisors is a clear invasion of the executive domain. *Marbury* v. *Madison*, 1 Cranch 137, 166; *United States* v. *George S. Bush & Co.*, 310 U. S. 371, 379–380; *Employers' Group* v. *National War Labor Bd.*, 143 F. 2d 145, 151 (C. A. D. C.). Accordingly, it has been held that the requirement of presidential approval of agency action, in and of itself, leads to the preclusion of judicial review. *Updegraff* v. *Talbott*, 221 F. 2d 342, 346 (C. A. 4); see also *United States Overseas Airlines* v. *Civil Aeronautics Board*, 222 F. 2d 303, 304 (C. A. D. C.).

(2). The court below sought to distinguish these principles on two grounds. First, it took the position that petitioner's refusal to change the tolls finally denied respondents' right to lower tolls,[84] and consti-

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[83] *Hayburn's Case*, 2 Dall. 409; *United States* v. *Ferreira*, 13 How. 40, 49–51; *Gordon* v. *United States*, 117 U. S. 697.

[84] See pp. 126–129, *infra*, on the question of whether respondents have a "right" to have tolls computed according to the toll formula of Section 412.

tuted final agency action; second, it claimed that the President played a very minor role in approving the tolls recommended by petitioner. In our view, there is no merit to either argument.

(*i*). Petitioner's failure to propose new tolls is not final. The Canal Company's directors serve at the pleasure of the President's designee, the Secretary of the Army. The President is well able to direct petitioner to propose new tolls, to give notice thereof, and to conduct a hearing, if he thinks that petitioner is duty bound to do so (*supra*, p. 49). The ultimate responsibility rests in the President, and it is not the province of the courts to force upon him advice which he does not desire.

The courts, consequently, have refused, not only to review administrative action which is in the nature of advice to the President, but also to compel an executive officer to give advice to the President.[80] In *Yelvington* v. *Presidential Pardon & Parole Attorneys*, 211 F. 2d 642 (C. A. D. C.), the court declined to direct the Pardon Attorney in the Department of Justice to submit a petition for clemency to the President. It held (at pp. 643–644):

> Failure of a subordinate to obey his superior's directions in matters of this sort is ordinarily a matter of internal supervision and discipline. Seldom, if ever, would a court serve a useful purpose by issuing mandamus to a subordinate official to report to a superior or send a

[80] Cf. p. 62, fn. 81. The problem may be different where an independent agency, not subject to the President's control, withholds or delays action.

> particular document to him. * * * Other and more practical remedies are usually available.
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> * * * * * *
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> If they [the officials] have erred, he [the President] may correct them. But we do not think we should attempt to do so.

Updegraff v. *Talbott*, 221 F. 2d 342, 344, 346 (C. A. 4), similarly refused to compel the Secretary of the Air Force to lay certain records before the President for action.

(*ii*). The second argument—that the President's role in approving new tolls is so negligible that it may be disregarded—is not borne out by the facts. Authority to propose new tolls and to initiate rate proceedings was given in 1950 to the Panama Canal Company, not in order to deprive the President of his functions and final responsibility, but to provide him with a body of trained advisors. It was prompted by the discovery that the Army was not equipped with staff facilities having the background required in the area of the technical and policy aspects of determining Canal tolls. But, at the same time, the President's role and authority were confirmed.

The 1950 Act goes back to the President's Proclamation No. 2775 of March 26, 1948, 62 Stat. 1494, which sought to raise the Canal tolls to $1.00 (*supra*, pp. 13–14). House Report No. 1304, 81st Cong., 1st Sess., following an investigation of this attempt, recommended (p. 7) that the President be requested to have a study made of the organization of the Panama Canal, and that Proclamation No. 2775 be suspended until a decision could be reached as to the

final organization of the Canal. The report pointed out (p. 4) that the recommendation to raise the Canal tolls had gone exclusively through Army channels, that there had been no consultation by the Army with any qualified rate-making authority, and that the record did not contain any expert testimony justifying the proposed increase in the tolls.

The study of the Bureau of the Budget, prepared in response to House Report No. 1304, stressed that the Department of the Army was not qualified to deal with policy issues such as are here involved (H. Doc. 460, 81st Cong., 2d Sess., p. 11, R. 95). But the study also explained that the determination of the Canal tolls involved not only technical rate-making problems, which indeed could be left to the Company's board of directors (p. 16, R. 102), but also policy questions because "[a]ctions taken by the Canal may vitally affect not only world trade and shipping but also intercoastal trade and transcontinental railroads" (p. 11, R. 95). It concluded that "review and approval of the rate by the President is essential" in view of these policy questions, especially in the field of national transportation policy (p. 16, R. 102). Again, during the hearings before the Committees of both Houses of Congress, Mr. Seidman of the Bureau of the Budget explained that the technical rate-making functions could be delegated to the Company's Board of Directors. He added, however:

> There are two important safeguards provided in the bill. The first is the requirement for a public hearing and the second for Presidential approval. *Since tolls may have an ef-*

> *fect on national transportation policy, review and approval of the rate by the President is believed essential.* [Emphasis added.][86]

The House hearings also disclosed the potential impact of toll rates on foreign policy and treaty obligations.[87]

In short, the purpose of presidential approval of the rates is not to see whether the figures computed by petitioner comply with the statutory formula, but to determine whether policy reasons require a departure from that formula or some modification in the weight to be attached to various factors. The President was not to be a supervising cost-accountant. He was to act as President of the United States. And it is surely not a matter of conjecture that the President might well exercise his presidential powers and duties to reexamine and modify toll rates proposed by petitioner. The tolls charged by the Canal have significant effects in the fields of national transportation policy and of foreign relations. Changes in those rates, in particular a reduction of the magnitude claimed by respondents[88] could not fail to have a wide reach, touching upon several of the areas with which the President is directly concerned.

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[86] *Maintenance and Operation of the Panama Canal*, Hearing before a Subcommittee of the Committee on Armed Services, United States Senate, 81st Cong., 2d Sess., on H. R. 8677, September 1, 1950, p. 7 (R. 109). To the same effect, *Authorization and Provision for the Maintenance and Operation of the Panama Canal, etc.*, Hearings before the Subcommittee on the Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives, 81st Cong., 2d Sess. on H. R. 8677, p. 46.

[87] See House Hearings, *supra*, fn. 86, pp. 43, 85–86.

[88] *Viz.*, a reduction of 26½ per centum or 24¢ (R. 33).

For example, the transcontinental freight rates of the railroads, from their very inception, have been kept on a low basis in order to meet water competition. *St. Louis & O'Fallon R. Co.* v. *United States*, 279 U. S. 461, 512–513 (dissenting opinion of Brandeis, J.); *Forrestal* v. *Abilene & S. Ry. Co.*, 263 I. C. C. 457, 469; *Class Rates, Mountain-Pacific Territory*, 296 I. C. C. 555, 566. Indeed, there has been indication to the effect that as the result of this competition transcontinental railroad freight rates have been depressed to such an extent that they "do not afford a fair standard of reasonableness". *War Materials Reparation Cases*, 294 I. C. C. 5, 70–71; see also *id.* at 64; *Transcontinental Rail Rates*, 268 I. C. C. 567, 571. Respondents demand that the Canal tolls be reduced 26½ per centum, or 24¢ per ton (R. 33). This substantial decrease would enable the steamship lines considerably to lower their rates. The railroads would be confronted with the choice of either losing a sizeable portion of their long-haul business or of lowering their own rates. In view of the present financial difficulties of the railroads, the question would arise whether such a result would be in accord with the national transportation policy expressed in Section 1 of the Transportation Act of 1940, 54 Stat. 899, 49 U. S. C., Ch. 1, note.

With respect to world trade and foreign relations, the effects of a decrease in the Canal tolls of such magnitude can hardly be accurately forecast by a court. The results may be beneficial; they also may be disturbing. Prophecy in this area is not in the province of judicial or forensic determination (cf.

Chicago & Southern Air Lines v. *Waterman Steamship Corporation*, 333 U. S. 103, 111). We shall point to only one of many potentialities. The Panama and Suez Canals compete for the trade of a large portion of the Far East and Australia. The reduction of the Panama tolls by 24¢ thus may divert a considerable amount of trade from the Suez Canal. Whether that is wise and appropriate in the present state of affairs must be left to the President. Similarly, the President is the one to take account of the possible effect on national defense, or on Central and South American relations, of a lowering of the tolls which might diminish supporting Canal Company functions in that region, overcrowd the Canal, burden its maintenance, increase its costs, or, conversely, perhaps add to its effectiveness.

In any event, it cannot be said, as did the court below, that "in the normal situation tolls would be set by the defendant [petitioner] and approved by the President * * *" and that the occasional intervention by the President amounts to a "mere possibility" (R. 253). Presidential approval of the toll rates constitutes an integral and "essential" part of the statutory plan. It may not be disregarded, and, as we have shown, a presidential veto of lowered rates is a definite possibility. The requirement of presidential approval indicates that petitioner's prescribing of new tolls does not constitute final agency action, but merely an internal, preliminary, administrative step in the nature of advice to the President, which the President may heed, modify, or ignore. This statutory plan—with the President made the focal

point—indicates once again that Congress sought to preclude judicial review of petitioner's rate determinations.

To sum up: judicial review has been precluded, within the meaning of Section 10 of the Administrative Procedure Act, because the statute relates to the management of the Government's own property, the Panama Canal; because of the complete control of petitioner's activities by the President and Congress; because the 1950 statute did not aim to make reviewable action which previously had not been reviewable; and, finally, because the overriding requirement of presidential action indicates that petitioner's action is a nonreviewable internal administrative step.

B. THE DISTRICT COURT LACKS JURISDICTION TO GRANT THE RELIEF RESPONDENTS DEMAND BECAUSE THEY SEEK TO COMPEL AGENCY ACTION COMMITTED TO AGENCY DISCRETION, AND BECAUSE, IN ANY EVENT, IT LACKS JURISDICTION TO GRANT RELIEF OF A MANDATORY NATURE.

In Subpoint A of Point I (*supra*, pp. 44–70), we have shown that judicial review of petitioner's administration of the Panama Canal tolls has been precluded by statute. Here, we shall demonstrate that the courts likewise lack jurisdiction to award the relief sought by respondents because the petitioner's toll-determining function constitutes a discretionary, non-

ministerial, power.[59] Moreover, the relief sought is of a mandatory nature, and it is well established that the only federal courts vested with this type of jurisdiction are those located in the District of Columbia. For these two reasons, our position is that, even if judicial review of petitioner's toll-determining functions is not wholly precluded (as we urge in Subpoint A), the District Court below cannot order petitioner to take action to lower the tolls, as respondents would have it do.

1. *The courts lack jurisdiction to compel petitioner to prescribe new tolls because that function is discretionary and non-ministerial.*

a. *Judicial jurisdiction to compel official action is limited to instances in which the enforcement of ministerial duties is sought.* According to Section 10 of the Administrative Procedure Act, *supra*, p. 6, judicial review cannot be had to the extent that agency action is by law committed to agency discretion. This proviso incorporates the rule going back to *Marbury* v. *Madison*, 1 Cranch 137, 166, and *Decatur* v. *Paulding*, 14 Pet. 497, 514–517, that the power of the courts to *compel* official action, *i. e.*, their mandamus jurisdiction, is normally limited to the enforcement of non-discretionary ministerial duties.

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[59] Section 10 of the Administrative Procedure Act, *supra*, p. 6, does not authorize judicial review "so far as (1) statutes preclude judicial review *or* (2) agency action is by law committed to agency discretion." (Emphasis added.) In Subpoint A, *supra*, we have discussed the first branch of this exception; in this part, Subpoint B, we discuss the second branch.

This distinction between discretionary and ministerial duties is a corollary of the doctrine of the separation of powers upon which our Constitution rests. Chief Justices Marshall and Taney stressed in *Marbury* v. *Madison* and *Decatur* v. *Paulding* that the courts are coordinate with, not superior to, the executive branch; they have no general supervisory power over the manner in which administrative officials perform their duties requiring the exercise of judgment and discretion. Consequently, the affirmative intervention of judicial power *to compel action* is ordinarily limited to those instances where an official fails to comply with an absolute statutory duty, *i. e.*, where he fails to perform a ministerial act.[10] *Marbury* v. *Madison, supra*, at 166; *Decatur* v. *Paulding, supra*, at 515; *Work* v. *Rives*, 267 U. S. 175, 177; *Wilbur* v. *United States*, 281 U. S. 206, 218–219; *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U. S. 540, 543. An official act is ministerial "[w]here the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command * * *". *Wilbur* v. *United States*, 281 U. S. 206, 218; see also *United States* v. *Wilbur*, 283 U. S. 414, 420; *Interstate Commerce Commission* v. *New*

[10] Where it has been determined that the duty is of a discretionary nature, the courts lack jurisdiction. *Marbury* v. *Madison*, 1 Cranch 137, 170; *United States ex rel. Goodrich* v. *Guthrie*, 17 How. 284, 304; *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 577; *United States ex rel. Tucker* v. *Seaman*, 17 How. 225, 230; *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40, 48; *Work* v. *Rives*, 267 U. S. 175, 177. On the relationship of these considerations to the standing problem, see *infra*, p. 101.

York, N. H. & H. R. Co., 287 U. S. 178, 203, 204; *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U. S. 540, 543.

That the scope of a duty depends upon the interpretation of a statute does not automatically render a duty "ministerial." The interpretation of a statute frequently is included among the duties involving judgment and discretion entrusted to an official, *Decatur* v. *Paulding*, 14 Pet. 497, 515. The interpretation of "a statute or statutes the construction or application of which is not free from doubt * * * is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus", *Wilbur* v. *United States*, 281 U. S. 206, 219, and the authorities there cited. In particular, the construction of a statute *by the agency entrusted with its administration* is a "discretionary" matter, reviewable in mandamus proceedings only if it is "clearly erroneous" and the matter is "peradventure clear,"[91] or, in other words, if it does not require the gathering of its purport "by doubtful inference from statutes of uncertain meaning". *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.*, 287 U. S. 178, 203–204. In this respect, executive agencies are not "mere fact-finding bodies", *Gray* v. *Powell*, 314 U. S. 402, 412. Conversely, judicial review in the nature of mandamus cannot be made

[91] *United States ex rel. Chicago Great Western R. R. Co.* v. *Interstate Commerce Commission*, 294 U. S. 50, 63.

to perform the function of a writ of error.[92] These considerations are all accentuated where the plaintiffs, as respondents do here, merely assert that the administrative decision was incorrect, not that the officials acted outside the scope of their authority. *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 156–157 (concurring opinion).

b. *Rate determinations, such as determinations of the Canal tolls, are primarily discretionary.* (*1*). In *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546, this Court explained that the

> * * * process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. * * *

Again, *New York* v. *United States*, 331 U. S. 284, 335, stresses that the

> * * * problems of transportation economics are complicated and involved. For example, the determination of transportation costs and their allocation among various types of traffic is not a mere mathematical exercise. Like other problems in cost accounting, it involves the exercise of judgment born of intimate knowledge of the particular activity and the making of adjustments and qualifications too subtle for the uninitiated. * * *

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[92] *Commissioner of Patents* v. *Whiteley*, 4 Wall. 522, 534; *Interstate Commerce Commission* v. *Waste Merchants Association*, 260 U. S. 32, 34; *Work* v. *Rives*, 267 U. S. 175, 183, and the authorities there cited; *Interstate Commerce Commission* v. *United States ex rel. Campbell*, 289 U. S. 385, 394; and see *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 144.

Rate determinations fall into the area of decisions which are delicate, complex, and involve a large amount of prophecy, specialized knowledge, information and experience; they rest upon considerations not entirely susceptible of strict proof or disproof. The courts have neither the "aptitude, facilities nor responsibility" to re-examine *de novo* such issues which essentially raise problems entrusted to executive or administrative judgment and discretion. *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103, 111; see also *Chicago, B. & Q. Ry. Co.* v. *Babcock*, 204 U. S. 585, 598; *Williamsport Wire Rope Company* v. *United States*, 277 U. S. 551, 559, 561; *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 303; *Stark* v. *Wickard*, 321 U. S. 288, 310.

This Court, accordingly, has held that constitutional courts, such as the courts below and this Court, cannot review the legislative discretion inherent in the process of rate determination as a whole. *Keller* v. *Potomac Elec. Co.*, 261 U. S. 428, 440–444; see, also, *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464, 467–469. At most, Congress confers upon the courts the power to review specific questions of law and to overturn findings of fact which are arbitrary or capricious, or not supported by substantial evidence (*Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 275–276, see also Administrative Procedure Act, Section 10 (e), *infra*, p. 172). The range of discretion rests with the ratemaking agency.

(*2*). Congress has certainly not expanded these

principles of judicial review with respect to the process of prescribing tolls for the Panama Canal. To the contrary, it has indicated—by the deliberate use of permissive, discretionary, language—that toll determinations are entrusted to the discretion of petitioner and the President. Pursuant to Section 411, petitioner "is *authorized* [not directed] to prescribe and from time to time change * * * the tolls that shall be levied for the use of the Panama Canal * * *." (Emphasis added.) On the other hand, an examination of the Act of September 26, 1950 (64 Stat. 1038, *infra*, pp. 159–169), which cast Sections 411 and 412 of the Canal Zone Code into their present form, discloses that Congress repeatedly and deliberately used mandatory language when it intended to impose a binding duty upon petitioner. Section 3 of the Act, amending Title 2, Section 10 of the Canal Zone Code, *infra*, pp. 160–163, twice uses the terms "the Panama Canal Company shall promptly adjust and pay". Sections 6 and 7, amending Title 2, Section 246 of the Canal Zone Code *infra*, pp. 164–165, use terms such as "the corporation shall pay," and "the corporation is further obligated". Even Sections 11 and 12 (*infra*, pp. 167–169), amending Sections 411 and 412 of the Canal Zone Code—the very provisions here involved—in other contexts repeatedly use the term "shall" in the mandatory sense.

The Act of June 29, 1948, 62 Stat. 1075, incorporating the Panama Railroad Company (*supra*, pp. 147–157), which, as an earlier amendment to the Canal Zone Code, is *in pari materia* with the 1950 statute, also

contains language which is mandatory on its face. Sections 245 and 246, as added by Section 2 (*infra*, pp. 148–151), repeatedly use the term "shall" in a directive sense; in Section 251 (*infra*, p. 155), the corporation is "authorized and directed" to take over the assets of the old New York corporation; Section 253 (*infra*, p. 156), imposes upon the board of directors "the power and duty". In view of this use of unambiguously mandatory language, especially the combination "authorize and direct", the selection of the term "authize" in Section 411 of the Code discloses that Congress sought to grant petitioner permissive, discretionary, powers in the area of computing the Canal tolls. *United States* v. *Wilbur*, 283 U. S. 414, 417–418.

The antecedent Panama Canal legislation confirms that the word "authorized" in Section 411 (as added in 1950) was not intended to imply a mandatory duty. This language is identical with that used in Section 5 of the 1912 Act (*supra*, p. 12) pursuant to which the President was "authorized to prescribe and from time to time change" the Canal tolls. Prior to 1950, the President's power to prescribe canal tolls obviously was not subject to judicial review. If Congress had intended that petitioner's toll fixing activities were to be considered a ministerial duty, enforceable not only by the right to petition the President and Congress but also by judicial decree, it would not have continued to use statutory language, including the term "authorize", which carried with it a long history of discretionary authority and preclusion of judicial review. See, also, *supra*, pp. 54–56, 66–70.

c. *Petitioner has not violated any ministerial duty.* Assuming *arguendo* that the courts have jurisdiction to review the violation by petitioner of a ministerial duty in the process of toll determination, it is apparent that none of respondents' specific charges involves duties of a ministerial nature. Briefly, respondents, in adopting the Comptroller General's theory (*supra*, pp. 18–20, 22–23), complain (i) that petitioner did not allocate an appropriate share of the cost of the Canal Zone Government and of the corporate overhead to the cost of operating the Panama Canal—specifically, that the share allocated was too high and that, if petitioner had performed its statutory duty, the tolls of the Canal would have to be lowered by about 25% (*supra*, pp. 66–69; R. 33); (ii) that the deficit in the operations of the supporting activities brought about by the proper allocation of the cost of the Canal Zone Government (and of the overhead) should have been made up by an increase in the prices charged by those activities; and (iii) that this deficit does not constitute an element of the "costs of maintaining and operating the Panama Canal together with the facilities and appurtenances related thereto" which are recoverable by tolls.

(*1*). In the first place, this case does not involve the situation in which an agency has arbitrarily refused to act although it is required to do so, and in which the court may direct it to act, without assuming to control or guide the exercise of its authority. Cf. *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 551; *Interstate Commerce Commission* v. *Humboldt S. S. Co.*, 224 U. S. 474, 485. Petitioner's refusal to lower the Canal rates is not based

upon a failure to take any action at all, but upon its continuous observation and evaluation of the pertinent data and of its reasoned determination that, according to its interpretation of the facts and the law, a change in the toll rate is neither indicated nor necessary. 100 Cong. Rec. (Daily Ed.) A1995 *supra*, pp. 17–18; *infra*, pp. 173–176.[93] Respondents thus seek, in reality, an order compelling petitioner to repeat an act already performed and to reverse its earlier decision. This, however, cannot be done unless the duty is of a ministerial nature. *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40, 48; *Wilbur* v. *United States*, 281 U. S. 206, 218; *Interstate Commerce Commission* v. *United States ex rel. Campbell*, 289 U. S. 385, 393–394.

(2). The particular issues as to which respondents challenge petitioner's views, on their face, do not involve the simple, peremptory, and ministerial type of duty which the courts have the power to enforce by mandatory decree. Indeed, the court below admitted as much when it held that petitioner's conceptions of its statutory duties "are reasonable from the naked words" of the statute (R. 245), and then based its determination that petitioner had violated its duty on an extensive discussion of the complicated legislative history of the 1950 statute and of the purposes it supposedly was designed to accomplish

[93] See also *Changes in the Administration of the Panama Canal Company*, Hearings before the Subcommittee on Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives, 84th Cong., 1st Sess., on H. R. 6917, etc., p. 163. *Panama Canal (Changes in Administration)*, Hearings before the Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 84th Cong., 2d Sess., on S. 2167, p. 94.

(R. 245–249). Significantly, the analysis of the same materials by the District Court came to the opposite result (R. 219–225). As this Court held in *United States* v. *Wilbur*, 283 U. S. 414, 419, the courts will not re-examine on mandamus an administrative interpretation of a statute supported by its "words"; in any event, in the present situation, petitioner's alleged duty to lower the rates cannot be said to be "clear and indisputable", *ibid.* at 420.

The first of the particular fiscal questions involves the process of determining what constitutes an "appropriate share of the net costs of operation of the Canal Zone Government", giving "substantial weight * * * to the ratio of estimated gross revenues from tolls to the estimated gross revenues of the said corporation". This language, using terms such as "appropriate share" and "substantial weight", shows that the distribution of the cost of the Canal Zone Government between the Canal operation proper and the remaining supporting activities is discretionary. As the Court stressed in *New York* v. *United States*, 331 U. S. 284, 335 (*supra*, p. 74), such cost allocations do not constitute "a mere mathematical exercise" but require the exercise of judgment. Even S. Rept. 2375, 84th Cong., 2d Sess., which on the whole is critical of petitioner, agrees (at p. 24) that under Section 412 (b) of the Canal Zone Code "the proportionate revenues" are not "the sole factor in dividing the Zone Government costs".

The reason for petitioner's refusal to apportion the cost of the Canal Zone Government (and of the corporate overhead) strictly according to the proportion-

ate revenues, and to allocate it to its several activities, is that such a procedure would create accounting deficits in its individual activities, and such deficits would have to be made up or erased in some way. This consideration is, as the Comptroller General himself concedes, in accordance with generally accepted accounting practices.[94] Petitioner's position on this score has been repeatedly explained to Congress.[95] Managerial and fiscal judgment of this type does not constitute a ministerial function which the courts can compel an agency to perform according to some fixed concepts of the proper rule to be applied. Our basic position, to reiterate, is that petitioner's allocation of the cost of the Canal Zone Government and of the

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[94] Comptroller General's Report for 1956, H. Doc. 210, 85th Cong., 2d Sess., p. 16. For the underlying accounting considerations, see petitioner's statement in *Panama Canal (Changes in Administration)*, *supra*, fn. 93, p. 69: "What constitutes an appropriate share of general corporate charges to be recovered on sales of supporting services is a matter of management judgment in each case. The experience of private industry clearly demonstrates that the proper assessment of such costs cannot be satisfactorily determined by the application of rigid cost allocation formulas which would prorate overheads uniformly over canal customers, employees, and other users of supporting services alike. In most cases the pro rata allocation of general corporate charges to each supporting activity would dictate unreasonable or prohibitive prices. The pricing objectives that will produce the greatest total benefit is that which will produce the maximum operating income before general corporate expense."

[95] See, *e. g.*, *Study of the Operations of the Panama Canal Company and Canal Zone Government*, Hearings before the Committee on Merchant Marine and Fisheries, House of Representatives, 84th Cong., 1st Sess., March 29–31, 1955, pp. 17–18, 21, 103 and the documents referred to *supra*, p. 20, fn. 47. See also *infra*, pp. 136–138.

corporate overhead constitutes a function entrusted to petitioner's judgment.[26] And if petitioner determines that according to its allocation figures the toll formula does not warrant a change in tolls, it is not the province of the courts to correct those figures or make a substitute allocation.

(3). Assuming, however, that petitioner was under a duty to divide the cost of operating the Canal Zone Government so as to lower substantially the share allocated to the Canal operations and to create a deficit in the business operations, the question still arises whether in those circumstances petitioner was subject to the ministerial duty to lower the Canal rates. Petitioner's position is that this deficit of the business activities constitutes part of the costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, which the tolls (according to Section 412 (b), *supra*, pp. 4–5) should cover. Respondents object to this interpretation of the toll formula and claim that, in any event, petitioner was duty bound to avoid this deficit by raising the prices charged by the supporting facilities rather than by maintaining the tolls at their present level.

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[26] The complexity of the financial problems involved appears from the Comptroller General's report itself. Of the costs of the Canal Zone Government, the 1954 Report (p. 13, R. 54) allocated to the Canal operations 65% in 1954, 63% in 1953 and 55% in 1952. It pointed out that, if the allocation had been based upon the ratio of gross investment, rather than gross revenue, the supporting business activities' share in the cost of the Canal Zone Government would have amounted to only 22%.

Petitioner's answer to this latter contention is that, as a matter of business judgment, it is not feasible to increase those prices to the extent that they would absorb an "appropriate share" of the Canal Zone Government. The customers of the supporting facilities fall into two groups: (a) employees of petitioner itself and of the Canal Zone Government and (b) the Canal users. For the former, relatively low prices in the commissaries and similar establishments constitute customary fringe benefits. Substantial price increases would merely result in raises of salaries, *i. e.*, a general increase of the cost of operations.[37] On the other hand, if the costs to the Canal users for services such as dry-docking and repairs would be increased substantially, they would take their business elsewhere.[38] Any attempt to burden the supporting activities with the annual $5,000,000 deficit computed by the Comptroller General (R. 43, 53) thus would price them out of business. Congress has been advised of

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[37] Cf. the Comptroller General's Report for 1954, H. Doc. 160, 84th Cong., 1st Sess., pp. 14–16, R. 56–58. Comptroller General's Report for 1956, H. Doc. 210, 85th Cong., 1st Sess., pp. 19, 69. Respondents' own spokesmen conceded that "it is not general business practice for American corporations operating in foreign countries to charge their employes with the full cost of furnishing such goods and services in a foreign land." *Changes in the Administration of the Panama Canal Company*, Hearings before the Subcommittee on Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives, 84th Cong., 1st Sess. on H. R. 6917, etc., December 5, 1955, p. 23.

[38] At the hearings referred to in the preceding footnote, respondents' spokesman admitted that respondents benefited to a large extent from this pricing policy. *Ibid.*, pp. 24–29.

this,[9] and the Comptroller General's Report for 1956 concedes that it is economically impracticable to raise rates and prices so as to recover all the costs which, according to his theories, should be allocated to the supporting activities.[1]

Petitioner's determination that the prices charged by the supporting business activities cannot be raised—if an appropriate share of the Canal Zone Government and of the corporate overhead has to be charged to them—so as to avoid a deficit in their operations, is thus supported by the exercise of sound business judgment. This is the very type of issue which has traditionally been considered outside the realm of the judicial branch.

(*4*). We finally reach the legal question of whether a deficit in the operation of the supporting business activities constitutes an element of the "costs of maintaining and operating the Panama Canal together with the facilities and appurtenances related thereto" within the meaning of Section 412, and therefore recoverable through tolls, or whether the Comptroller General and respondents are correct in insisting that such losses can be recovered only through special appropriations, *i. e.*, at the expense of the federal taxpayer. We submit that the former alternative represents the correct interpretation of the statute.

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[9] *Study of the Operations of the Panama Canal Company and Canal Zone Government*, Hearings before the Committee on Merchant Marine and Fisheries, House of Representatives, 84th Cong., 1st Sess., March 29, 30, and 31, 1955, pp. 17–18, 103.

[1] H. Doc. 210, 85th Cong., 1st Sess., pp. 19–20, see also p. 7. For a résumé of petitioner's position, see *ibid.*, pp. 68–69.

and, in any event, that it is not so "clearly erroneous" as to be reviewable on mandamus (*cf. supra*, pp. 73–74).

As a matter of language, the statutory words "facilities and appurtenances related thereto", *i. e.*, to the Panama Canal operations, necessarily refer to petitioner's business activities, most of which formerly had been carried out by the Panama Railroad Company (*supra*, pp. 9–10). "Facilities and appurtenances" are words of art in the Canal Zone Code. Only a year prior to the 1950 amendment, Section 2 of the Act of August 12, 1949, amending Canal Zone Code, Title 2, Sections 51 and 52 (*infra*, pp. 157–159), described as "facilities and appurtenances" of the Panama Canal such supporting business activities as docks, wharves, piers, drydocks, salvage and towing facilities, marine railways, warehouses, hotels and restaurants, and, in general, sales, and such establishments as render sales and services to vessels using the Canal, and to employees of the Canal Zone Government and the Panama Railroad Company. This statutory definition of the supporting business activities as "facilities and appurtenances" restates the holding of this Court in *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401, 403–404, 406, that the business activities of the former Panama Railroad Company constituted "auxiliaries primarily designed and used to aid in its [the Canal's] management and operation." Accordingly, as a matter of statutory language, the term "costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto," as used in Section

412, includes any deficit suffered in the operation of the supporting business activities.

The same result flows from the general statutory plan and the purpose Congress sought to accomplish by the enactment of the 1950 amendment to the Canal Zone Code. The alleged bookkeeping deficit of the supporting business activities has been created by the rigid allocation to them of a pro rata share in the cost of the operation of the Canal Zone Government (cf. *supra*, pp. 78–82). If respondents and the court below are correct, this deficit, representing a part of the cost of operating the Canal Zone Government, would have to be paid out of appropriated funds, not out of the Canal revenues. Such a result, however, would be in direct conflict with the Canal Zone Code, Title 2, Section 246 (e) (*infra*, p. 165), also part of the 1950 legislation, which declares expressly that "the net costs of operation of the Canal Zone Government, which are deemed to form an integral part of the costs of operation of the Panama Canal enterprise as a whole * * *". In other words, under the statute, the costs of the Canal Zone Government must be recovered through tolls if the profits of the supporting business activities are unable to pay for them.

The notion that a part of the cost of the Canal Zone Government would not be paid out of petitioner's revenues, that the Canal tolls would be lowered correspondingly, and that Congress would appropriate several million dollars a year in order to finance such a subsidy to the Canal users—two-thirds of which are of foreign registry (*supra*, pp. 19–20)—is, of course,

diametrically opposed to the objectives the 1950 amendment was designed to accomplish. Two ideas pervade the legislative history of that statute, first, that the new statutory plan would not cost the Government any money, *i. e.*, that petitioner would be financially self-sufficient; and, second, that under the new formula the tolls would rise from 90¢ to 95¢, or even $1.00. During the hearings before the Senate Committee on Armed Services, Senator Byrd stated:

> * * * for the purpose of the record, I want to show that the passage of this bill is estimated to bring in new revenue of 5 cents a ton on 28,000,000 tons which would be about $1,400,000 of new revenue. We will not lose any revenue.[2]

Similarly, it was pointed out repeatedly on the floor of the House of Representatives that the new legislation did "not carry added cost to the Government",[3] and that the toll charges at cost under the terms of the bill would amount to 95¢.[4] If the statute imposed

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[2] *Miscellaneous Bills*, Hearing before the Committee on Armed Services, United States Senate, 81st Cong., 2d Sess., on S. 2222, etc., September 7, 1950, p. 22, see also pp. 16, 17, 18, 19. To the same effect, *Maintenance and Operation of the Panama Canal*, Hearing before a Subcommittee of the Committee on Armed Services, United States Senate, 81st Cong., 2d Sess., on H. R. 8677, September 1, 1950, p. 18 (R. 128); S. Rept. 2531, 81st Cong., 2d Sess., p. 5 (R. 165).

[3] Representative O'Toole, the author of the pertinent House Report 2935, 81st Cong., 2d Sess., at 96 Cong. Rec. 13372; Rep. Fugate: 96 Cong. Rec. 13373; Rep. Miller: 96 Cong. Rec. 13375.

[4] Rep. Miller at 96 Cong. Rec. 13375; for additional references see the opinion of the district court, fn. 17, R. 220–221, see also the Comptroller General's Report for 1954, H. Doc. No. 160, 84th Cong., 1st Sess., p. 2 (R. 42).

any ministerial duty at all upon petitioner, it would have been immediately to increase the tolls to 95¢ per net vessel ton.

Moreover, as we have noted, one objective of the 1950 amendment was to consider the Canal operations and the supporting business activities as an economic unit; the profits of the latter were to be used to reduce the cost of the Canal operations (*supra,* pp. 14, 15). A statutory interpretation which seeks to insulate a deficit in business operations from the Canal operations conflicts with the basic philosophy of the 1950 Act.

The sum of it is that petitioner's interpretation of the toll formula—that a deficit in the operation of the supporting business activities, especially if created by an allocation of the costs of the Canal Zone Government, constitutes costs "of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto" which are recoverable through tolls—is in full accord with the statutory language and with the expressed congressional purposes.

In any event, petitioner's is a far more reasonable interpretation of the statute than respondents' contention, according to which the tolls have to be lowered rather than raised, and the resulting deficit charged to the United States. And the basic issue in these proceedings is not whether our interpretation of the statute is correct—we believe that it is—but whether or not it is "capricious or arbitrary"[5] or "clearly erroneus"[6] (*supra,* pp. 73–74). Even those

[5] *Work* v. *Rives*, 267 U. S. 175, 183.

[6] *United States ex rel. Chicago Great Western R. R. Co.* v. *Interstate Commerce Commission*, 294 U. S. 50, 63.

who disagree have to concede that the matter is not "peradventure clear".[1] In these circumstances, petitioner's task of interpreting the very statute entrusted to its administration constitutes a discretionary duty (*supra,* p. 73), or, as this Court held in *Interstate Commerce Commission* v. *New York, N. H. & H. R. R. Co.,* 287 U. S. 178, 204, "Where a duty is not plainly prescribed, but is to be gathered by doubtful inference from statutes of uncertain meaning, 'it is regarded as involving the character of judgment or discretion' (*Wilbur* v. *United States ex rel Kadrie, supra* [281 U. S. 206, 219]), and mandamus is thereby excluded".

(5). In our petition for a writ of certiorari (pp. 37–41), we suggested that the departure by the court below from the accepted standards governing the exercise of a court's mandatory powers was understandable only on the basis that the Court of Appeals believed that petitioner was subject to the ministerial duty to comply with the Comptroller General's audit report. We showed that this is not the import of the Government Corporation Control Act (Petition in No. 251, pp. 37–41). Respondents' brief in opposition (p. 2) stated formally that the "Court of Appeals did not hold and the plaintiffs [respondents] did not maintain or even intimate that the GAO interpretation of the statute *.* * was binding on defendant [petitioner]". Respondents stressed that the Court of Appeals ruled on the meaning of Sections 411 and 412 on the merits, and repeatedly referred

[1] *United States ex rel. Chicago Great Western R. R. Co.* v. *Interstate Commerce Commission,* 294 U. S. 50, 63.

to the second question presented in our petition as a "false issue".[8] Respondents thus seem to have abandoned the argument made in par. 10 of their complaint (R. 6) and par. 3 of the affidavit supporting their motion for summary judgment (R. 13–15) that the accounting determinations of the Comptroller General are final and conclusive on petitioner. In view of this concession, we shall not burden this brief with any argument on this issue.

2. *The district courts outside the District of Columbia lack jurisdiction to entertain actions in the nature of original writs of mandamus.*

a. *Congress has not conferred original mandamus powers on the federal courts outside the District of Columbia.* In the preceding part of this brief (*supra*, pp. 71–90), we have shown that this action, designed to compel official action in the nature of mandatory proceedings, cannot be maintained because the duties involved are not ministerial. Here, we shall show that, in any event, the District Court for the Southern District of New York lacked jurisdiction because the power to maintain mandatory proceedings has not been conferred upon it.

(*1*). A long line of cases relying on Sections 11 and 14 of the Judiciary Act of 1789 (1 Stat. 78, 81–82, now 28 U. S. C. 1332, 1345, 1651) holds that Congress did not confer upon the district courts outside the District of Columbia jurisdiction to grant original writs of mandamus or other prerogative writs. *McIntire* v. *Wood*, 7 Cranch 503, 504; *McClung* v. *Silli-*

[8] Brief in Opposition in No. 251, pp. 2, 3, 5.

man, 6 Wheat. 598; *Bath County* v. *Amy*, 13 Wall. 244, 248; *Rosenbaum* v. *Bauer*, 120 U. S. 450; *Knapp* v. *Lake Shore & Michigan Southern Ry. Co.*, 197 U. S. 536; *Covington & Cincinnati Bridge Co.* v. *Hager*, 203 U. S. 109; *Stevenson* v. *Holstein-Friesian Ass'n*, 30 F. 2d 625, 626 (C. A. 2); *Truth Seeker Co.* v. *Durning*, 147 F. 2d 54, 56 (C. A. 2); *Amchanitzky* v. *Sinnot*, 69 F. 2d 97 (C. A. 2).

This lack of power has not been remedied by Rule 81 (b) of the Federal Rules of Civil Procedure which abolished the writ of mandamus and in its stead provided relief by appropriate action or motion, nor by the codification of Title 28 in 1948.[9] *United States ex rel. Vassel* v. *Durning*, 152 F. 2d 455 (C. A. 2); *Insular Police Commission* v. *Lopez*, 160 F. 2d 673, 677 (C. A. 1), certiorari denied, 331 U. S. 855; *Petrowski* v. *Nutt*, 161 F. 2d 938, 939 (C. A. 9), certiorari denied, 333 U. S. 842; *Marshall* v. *Crotty*, 185 F. 2d 622, 627 (C. A. 1); *Biggs* v. *Ward*, 212 F. 2d 209, 211 (C. A. 7); *Updegraff* v. *Talbott*, 221 F. 2d 342, 346 (C. A. 4); *MacNeil Bros. Co.* v. *Justices of the Superior Court*, 242 F. 2d 273, 274–275 (C. A. 1). Most recently, the Court of Appeals for the Seventh Circuit, for similar reasons, held that the federal courts lack jurisdiction to grant the prerogative writ of quo warranto unless expressly authorized to do so. *United States ex rel. Wisconsin* v. *First Federal Savings & Loan Ass'n*, 248 F. 2d 804 (C. A. 7),

[9] For a discussion of the legislative development, see *Marshall* v. *Crotty*, 185 F. 2d 622, 626–627 (C. A. 1).

pending on petition for a writ of certiorari, No. 732, October Term, 1957.

Section 10 (b) of the Administrative Procedure Act, *infra*, p. 171, pursuant to which judicial review may be had in "any court of competent jurisdiction" by "any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus)" does not confer any additional power on the district courts. It presupposes existing "competent" jurisdiction and does not contain a new grant of judicial power, or render competent a court which otherwise lacks jurisdiction. *Blackmar* v. *Guerre*, 342 U. S. 512, 515–516; *Almour* v. *Pace*, 193 F. 2d 699, 701, fn. 5 (C. A. D. C.); *Aktiebolaget Bofors* v. *United States*, 194 F. 2d 145, 149 (C. A. D. C.); *Adcox Schools* v. *Administrator of Veterans Affairs*, 217 F. 2d 54 (C. A. 9); *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 932–933 (C. A. D. C.), certiorari denied, 350 U. S. 884.

(*2*). Congress is fully aware that the district courts outside of the District of Columbia lack jurisdiction to grant original writs of mandamus. Whenever Congress feels that district courts should have authority to grant that type of relief for the enforcement of a specific statute, the legislation expressly so provides. Many important and recent statutes contain such clauses, see *e. g.*, the Federal Trade Commission Act, Section 9 (38 Stat. 722, 15 U. S. C. 49), Securities Act of 1933, Section 20 (c) (48 Stat. 86, 15 U. S. C. 77t); Securities Exchange Act of 1934, Section 21 (f) (48 Stat. 899, 15 U. S. C. 78u (f); Federal Power Act, Section 314 (b) (49 Stat. 861, 16 U. S. C. 825m);

Railway Labor Act of 1934, Section 3 (p) (48 Stat. 1189, 45 U. S. C. 153 (p); Bridge Act of 1940, Section 9 (54 Stat. 500, 33 U. S. C. 519); Interstate Commerce Act, Section 5 (8), as enacted by the Transportation Act of 1940, Section 7 (54 Stat. 908, 49 U. S. C. 5 (8)), and Section 20 (9), as added by the Act of June 29, 1906, Section 7 (34 Stat. 593, 49 U. S. C. 20 (9); Federal Deposit Insurance Act of September 21, 1950, Section 2 (7) (f)), 64 Stat. 878, 12 U. S. C. 1817 (f).[10] Thus, while Congress has dealt with this problem as recently as 1950, it has not considered it necessary or desirable to confer general mandamus jurisdiction upon the district courts outside the District of Columbia. Congress may have felt that many mandamus actions would be brought against Government officials and that such proceedings should be centralized in the District of Columbia (cf. *Brüner v. United States*, 343 U. S. 112, 114–115).

In these circumstances, there is no occasion to re-examine the interpretation of the original Judiciary Act made by this Court 145 years ago. This ruling has been repeatedly reaffirmed by the Court; it has been followed almost unanimously by the lower federal courts. Congress also has adopted it. Any

[10] For other and earlier statutes, still in effect, which confer mandamus powers on district courts outside the District of Columbia in specifically defined circumstances, cf. R. S. 5262, 45 U. S. C. 88; Act of August 7, 1888, Section 3, 25 Stat. 383, 47 U. S. C. 11; Act of March 2, 1917, Section 48, 39 Stat. 967, 48 U. S. C. 872; Federal Water Power Act of 1920, Section 26, 41 Stat. 1076, 16 U. S. C. 820; Act of March 4, 1927, Section 3, 44 Stat. 1424, 15 U. S. C. 433; Tariff Act of 1930, Section 333 (c), 46 Stat. 699, 19 U. S. C. 1333 (c).

change should come from that body. *Missouri* v. *Ross*, 299 U. S. 72, 75; *Hecht* v. *Malley*, 265 U. S. 144, 153; *United States* v. *Ryan*, 284 U. S. 167, 175; *Shapiro* v. *United States*, 335 U. S. 1, 16.

(*3*). The 1950 amendment to the Canal Zone Code did not confer mandamus jurisdiction upon the district courts by implication. That Congress has in many instances explicitly granted mandamus powers to the district court (*supra*, pp. 92–93) indicates that Congress knows how to express itself when it intends that these courts should exercise such powers. Accordingly, mandamus jurisdiction should not be found easily by way of implication. *Knapp* v. *Lake Shore and Michigan Southern Ry. Co.*, 197 U. S. 536, 543. Also, there is nothing in the 1950 statute suggesting a purpose to confer mandamus jurisdiction. The fact that petitioner is a corporation is irrelevant; so were the defendants in *Knapp* v. *Lake Shore & Michigan Southern Ry. Co.*, *supra*, and in *Stevenson* v. *Holstein-Friesian Ass'n*, 30 F. 2d 625 (C. A. 2). That petitioner has been made suable in the Southern District of New York (Section 245, *infra*, p. 148) does not constitute a grant of mandamus jurisdiction to that court. It means that the court may give all the relief it has jurisdiction to give, but no more. *Knapp* v. *Lake Shore and Michigan Southern Ry. Co.*, *supra*, at 542. Moreover, petitioner's Secretary maintains his office in the District of Columbia.[11] Mandatory relief against petitioner thus would be available in appro-

[11] Congressional Directory, 85th Cong., 2nd Sess., p. 555; United States Government Organization Manual, 1957–58, p. 444. See also *infra*, p. 181.

priate cases in the courts of the District of Columbia.

b. *The district court's lack of jurisdiction to grant mandatory relief was not cured by respondents' prayers for injunctive or declaratory relief.* (1) Respondents did not limit the prayers in their complaint to an order directing petitioner to prescribe new tolls (prayer No. 3, R. 8). They also asked for a declaration of petitioner's duty to prescribe new tolls (prayer No. 1, R. 8), and for an order enjoining petitioner from withholding or delaying the prescription of tolls and from using accounts different from those determined by the General Accounting Office (prayers 2 and 4, R. 8). These additional requests for relief, however, do not cure the lack of jurisdiction.

Prayers Nos. 2 and 4 ask that petitioner be enjoined from withholding and delaying official action and from using accounts less favorable than those determined by the Comptroller General. This is the equivalent of a direct order requiring petitioner to take the designated official action, and to use the accounts determined by the Comptroller General. The jurisdiction of the district courts obviously cannot depend on the circumstance whether a court order is phrased in the positive or the negative, or whether the complaint is entitled a petition for a writ of mandamus, or a prayer for an injunction.

This Court has recognized, beginning with *Gaines* v. *Thompson*, 7 Wall. 347, 352, that mandamus and mandatory injunction are legal equivalents, subject to the same rules, and that the form of the relief sought is irrelevant. *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 577; *Marquez* v. *Frisbie*, 101 U. S. 473,

475; *Smith* v. *Bourbon County,* 127 U. S. 105, 112; *New Orleans* v. *Paine,* 147 U. S. 261, 268; *Warner Valley Stock Co.* v. *Smith,* 165 U. S. 28, 33; *Miguel* v. *McCarl,* 291 U. S. 442, 452; *Virginian Ry. Co.* v. *System Federation, No. 40,* 300 U. S. 515, 551; cf. *Adams* v. *Nagle,* 303 U. S. 532, 542; *Colegrove* v. *Green,* 328 U. S. 549, 555; *Whitehouse* v. *Illinois Central R. Co.,* 349 U. S. 366, 373–374.

The inability of the district courts to grant mandatory relief goes to the substance and not to the form (*Smith* v. *Bourbon Co.,* 127 U. S. 105, 112), and cannot be circumvented by labelling an essentially mandatory proceeding as a bill in equity (*Smith* v. *Bourbon Co.,* 127 U. S. 105, 112; *Youngblood* v. *United States,* 141 F. 2d 912, 915 (C. A. 6); *Biggs* v. *Ward,* 212 F. 2d 209, 211 (C. A. 7)), or by the use of double negatives (*Knickerbocker Ice Co.* v. *Sprague,* 4 F. Supp. 499 (S. D. N. Y.)). In other words, the federal courts cannot by indirection do what they lack the power to do directly. *Finerau* v. *Bailey,* 2 F. 2d 363 (C. A. 5); cf. *Stevenson* v. *Holstein-Friesian Ass'n,* 30 F. 2d 625, 626 (C. A. 2).

(2). This Court's decision in *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U. S. 515, does not depart from these well-established rules. Rather, it reaffirms them by referring expressly to the equivalence of mandatory injunction and mandamus (at p. 551). The basic dispute in that case, as appears from an inspection of the briefs, was whether orders of the National Mediation Board issued pursuant to Section 2 Ninth of the Railway Labor Act of 1934 (48 Stat. 1186, 45 U. S. C. 152 Ninth created rights

enforceable in judicial proceedings, including mandatory injunctions, or whether they constituted merely unenforceable recommendations. The parties joined issue on that proposition alone.

The question whether district courts outside the District of Columbia had jurisdiction to grant a mandatory injunction in that situation was not raised by any party, nor discussed by the Court. Everyone apparently assumed that Section 3 First (p) (48 Stat. 1189, 45 U. S. C. 153 First (p)), which authorizes the district courts to enforce orders of the Adjustment Board "by writ of mandamus or otherwise," applied also to proceedings authorized by Section 2 of the Act.[12]

Subsequent decisions of this Court indicate that *Virginian Ry. Co., supra*, did not constitute an abandonment of the rule that, since mandamus and mandatory injunctions are equivalents, the latter relief may be granted only by courts vested with mandamus jurisdiction. *Adams* v. *Nagle*, 303 U. S. 532, 542, refers to the close relation between those two remedies. *Colegrove* v. *Green* 328 U. S. 549, 555, quotes with approval Professor Chafee's statement that "What might not be done directly by mandamus, could not be attained indirectly by injunction". Again, in *Whitehouse* v. *Illinois Central R. Co.*, 349 U. S. 366, 373–374, the Court agreed that where relief, although

[12] For other instances in which enforcement and review rights under that statute were viewed in the light of the statutory plan as a whole, see *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 304–306; *General Committee* v. *Missouri-Kansas-Texas R. R. Co.*, 320 U. S. 323, 330–337.

labeled equitable, sought affirmative action, it must be viewed "in the nature of mandamus",[13] and reaffirmed the essential equivalence of the two remedies in that situation. The lower courts have agreed that district courts lack the power to grant a type of relief which, whether called mandamus or injunction, "would have resulted in an order of the District Court commanding the defendant to do as plaintiff wished. This, in its essence, is a petition for writ of mandamus, which is not within the District Court's jurisdiction". *Biggs* v. *Ward*, 212 F. 2d 209, 211 (C. A. 7).

(*3*). Similarly, the district court had no jurisdiction to grant the declaratory relief sought in Prayer No. 3 of the complaint (R. 8). The Declaratory Judgment Act does not enlarge the jurisdiction of the federal courts nor permit the granting by indirection of relief which cannot be given directly. That statute merely enables the courts to give a new type of relief by declaring the plaintiff's right, even though no immediate enforcement is contemplated.[14] It always presupposes, however, that the federal courts have jurisdiction. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667, 671–672; *Clark* v. *Memolo*, 174 F. 2d 978, 980 (C. A. D. C.), and authorities there cited; *Cadillac Publishing Co.* v. *Summerfield*, 227 F. 2d 29, 30 (C. A.

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[13] *Illinois Central R. Co.* v. *Whitehouse*, 212 F. 2d 22, 30 (C. A. 7).

[14] Respondents obviously contemplate the immediate enforcement of their claim. In those circumstances, it is questionable whether the prayer for declaratory judgment has any separate justification. In any event, they cannot derive any procedural benefit from it.

D. C.), certiorari denied, 350 U. S. 901; *Morgantown Glassware Guild* v. *Humphrey*, 236 F. 2d 670, 672 (C. A. D. C.), certiorari denied, 352 U. S. 896.

It follows that the district courts may grant declaratory judgments only in those circumstances in which they have power to grant affirmative relief. *Putnam* v. *Ickes*, 78 F. 2d 223, 226 (C. A. D. C.); *Doehler Metal Furniture Co.* v. *Warren*, 129 F. 2d 43, 45–46 (C. A. D. C.), certiorari denied, 317 U. S. 663; *Aktiebolaget Bofors* v. *United States*, 194 F. 2d 145, 150 (C. A. D. C.). Accordingly, it has been held that courts which do not have the power to award mandatory relief also lack jurisdiction to declare the rights of the parties. *Marshall* v. *Crotty*, 185 F. 2d 622, 626–628 (C. A. 1); *Marshall* v. *Wyman*, 132 F. Supp. 169, 174 (N. D. Cal.).

To grant declaratory relief in the circumstances of this case would lead to serious complications. An enforcement order pursuant to 28 U. S. C. 2202 could not be granted because it obviously would be mandatory in nature. This Court, however, has ruled from the earliest times that the judicial power of the United States should not issue decisions which cannot be enforced against the executive branch. *Hayburn's Case*, 2 Dall. 409; *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103, 113–114. If, on the other hand, it is felt that petitioner could not ignore the declaratory judgment but would be under the strongest moral if not legal compulsion to comply

with it,[15] the ruling would then be plainly mandatory in nature and beyond the jurisdiction of the District Court. In either event, the District Court would lack jurisdiction to issue the declaratory relief.

C. RESPONDENTS LACK STANDING TO ASSERT THAT PETITIONER VIOLATED ITS OFFICIAL DUTIES WITH RESPECT TO THE DETERMINATION OF THE CANAL TOLLS

In this portion of our brief we shall demonstrate that respondents lack standing to challenge the alleged violation of petitioner's duties with respect to the Canal tolls.

Section 10 (a) of the Administrative Procedure Act deals with this question of standing, an issue which also goes to the jurisdiction of the court. *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, 197. Section 10 (a) provides that:

> Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Interpreted in the light of its general background and immediate history, this provision of the Admin-

[15] Note in this connection the practice of the courts in the District of Columbia Circuit pursuant to which declaratory relief rather than mandamus is awarded out of courtesy to the executive branch, and a mandatory order entered only in case of noncompliance with the declaratory judgment. *Borak* v. *Biddle*, 141 F. 2d 278, 281, certiorari denied, 323 U. S. 738; *Money* v. *Anderson*, 208 F. 2d 34, 38, fn. 13; *Mulligan* v. *Andrews*, 211 F. 2d 28, 31; *Norden* v. *Royall*, 90 F. Supp. 834, 835–836 (C. A. D. C.).

istrative Procedure Act does not enable respondents to maintain this action. Rather, it precludes the suit.

1. *Prior to the Administrative Procedure Act, administrative action could be challenged only by a person who sought redress of the violation of a specific duty owed to him by a public official, or by one "adversely affected" on whom the right to seek judicial review had been conferred by statute.*

a. *In the absence of specific statutory provision, a litigant seeking to challenge administrative action must show more than merely an adverse personal effect.* Under our system of government, the courts have no general visitatorial power over the legislative and executive branches. The mere fact that a court believes administrative or legislative action to be erroneous or unconstitutional does not give it any authority to intervene or veto.[16] The court's power to review administrative or legislative action is dependent upon the existence of a case or controversy in which a particular plaintiff complains of an interference with a specific right or of the failure to perform a duty owed to him personally. *Osborn* v. *The Bank of the United States*, 9 Wheat. 738, 819; *Marbury* v. *Madison*, 1 Cranch 137, 162–173, and footnote 16, *supra*, p. 101. It is not enough that the suitor claims to vindicate the general interest in the proper administration of the laws, which is common to all members of the public. ***Fairchild* v. *Hughes*,**

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[16] *Work* v. *Rives*, 267 U. S. 175, 183; *Cohens* v. *Virginia*, 6 Wheat. 264, 405; *Craig* v. *Leitensdorfer*, 123 U. S. 189, 211; *Muskrat* v. *United States*, 219 U. S. 346, 357; *Massachusetts* v. *Mellon*, 262 U. S. 447, 488; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 467, 478–479.

258 U. S. 126, 129; *Western Pacific Railroad Co.* v. *Southern Pacific Co.*, 284 U. S. 47, 51; *Ex parte Lévitt*, 302 U. S. 633, 634; *Stark* v. *Wickard*, 321 U. S. 288, 304.

On comparable principles, the federal courts cannot review administrative or legislative action solely upon an allegation of a financial loss. Unless the loss follows from the invasion of a legal or equitable right, or the violation of a duty owed to the complainant, it constitutes *damnum absque injuria* and does not give any occasion for the exercise of judicial power. *Stark* v. *Wickard*, 321 U. S. 288, 304; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 125; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 478–480. Thus, where administrative or legislative action simply deprives a person of a competitive advantage, or subjects him to lawful competition, the financial loss is not sufficient to permit the judiciary to examine the legality of the challenged action. *Edward Hines Trustees* v. *United States*, 263 U. S. 143; *Sprunt & Son* v. *United States*, 281 U. S. 249; *Alabama Power Company* v. *Ickes*, 302 U. S. 464, 478–485; *Tennessee Power Co.* v. *T. V. A.*, 306 U. S. 118, 137. Similarly, a consumer has no general standing to complain that the Treasury allegedly is exacting excessive customs duties, *Louisiana* v. *McAdoo*, 234 U. S. 627, 631–632; or that minimum prices have been computed incorrectly, cf. *City of Atlanta* v. *Ickes*, 308 U. S. 517; *Stark* v. *Wickard*, 321 U. S. 288, 319 (dissenting opinion). *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, holds that, since a Government con-

tractor has no legal right to deal with the Government, he cannot be heard to complain that alleged violations of the law by Government contracting officer's subject him to financial loss. The power of the courts to review the legality of legislative or administrative action is an incident of their function to decide concrete cases and controversies, and normally presupposes the invasion of "a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Tennessee Power Co.* v. *T. V. A.*, 306 U. S. 118, 137–138.

This historical limitation of the power to challenge the legality of administrative or private action to those whose "legal rights" have been directly injured is not a mere "legal technicality" or "obstruction on the road of justice".[17] It constitutes a necessary element in judicial administration. This Court has pointed out that, if everyone who has suffered, or fears to suffer, a financial loss as the result of the acts of a private individual or of an official could challenge their validity in court, "a vista of litigation hitherto unrevealed" would be opened. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 480–481.

In this very case, if an adverse financial effect were a sufficient criterion to confer standing, petitioner's rate determination could be challenged not only by respondents on the ground that the tolls are too high,

[17] Cf. *United States* v. *Storer Broadcasting Company*, 351 U. S. 192, 213–214 (dissenting opinion of Frankfurter, J.).

but also by competing railroads on the ground that they are too low.[18] Canal shippers and passengers would also have standing. Even shippers by railroad could claim that high Canal tolls affect them adversely, because, if the tolls were lower, the railroad would have to decrease its rates in order to meet this competition.[19] And since the interests of these financially-affected parties frequently are diametrically opposed, judicial proceedings at the suit of only one of them are not likely to do complete justice.[20]

b. *Congress may authorize a person adversely affected by administrative action to vindicate the public interest.* The authority of the courts to pass on the legality of administrative action at the suit of private individuals does not rest solely on their constitutional or equity powers to decide cases and controversies involving specific legal or equitable rights. In many instances, the review powers of the courts are derived

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[18] See *supra*, p. 68. Indeed, it is not improbable that the adverse effect of inadequate tolls upon the railroads would be far more serious than that of excessive ones upon respondents. The latter usually can be passed on to the shippers, at least in part (see *infra*, pp. 143–144). On the other hand, if as the result of lowered tolls on the Panama Canal, the railroads have to decrease their transcontinental freight rates, they would have to absorb the loss themselves.

[19] Cf. the letter of the Western States Meat Packers Association to Senator Byrd, dated September 1, 1950, *Maintenance and Operation of the Panama Canal*, Hearing before a Subcommittee of the Committee on Armed Services, United States Senate, 81st Cong., 2d Sess., on H. R. 8677, pp. 40–41.

[20] This problem has found its technical solution in administrative proceedings, in which all the conflicting financial interests may participate, followed by statutory review proceedings where provided by Congress, cf. pp. 104–107.

from express statutory authorization. In certain of these statutory proceedings, review may be had at the suit of a "person who is aggrieved or whose interests are adversely affected",[21] a "party to the proceeding * * * aggrieved by an order issued by the Commission",[22] a "party aggrieved by a final order",[23] or a "person aggrieved by an order issued by the Commission in a proceeding to which such person is a party".[24]

It is significant that these formulae are found in regulatory statutes. Administrative action in such cases usually affects a direct legal interest of the regulated person who would generally be entitled to judicial review under the equity powers of the courts;

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[21] Federal Communications Act, Section 402 (b) (6), 48 Stat. 1093, as amended, 47 U. S. C. 402 (b) (6).

[22] Federal Power Act, Section 313, as amended by the Act of August 26, 1935, Title II, Section 213, 49 Stat. 860, 16 U. S. C. 825l; Natural Gas Act, Section 19, 52 Stat. 831; 15 U. S. C. 717r.

[23] Act of December 29, 1950, Section 4, 64 Stat. 1130, 5 U. S. C. 1034.

[24] Securities Exchange Act of 1934, Section 25, 48 Stat. 901, 15 U. S. C. 78y. The Bituminous Coal Act of 1937, which expired in 1943, contained a similar formula, Section 6 (b), 50 Stat. 85, 15 U. S. C. (1940 Ed.) 836 (b), cf. *Associated Industries* v. *Ickes*, 134 F. 2d 694, 699 (C. A. 2), vacated as moot, 320 U. S. 707.

The Securities Act of 1933, Section 9, 48 Stat. 80, 15 U. S. C. 77i, and the Public Utilities Holding Act of 1935, Section 24, 49 Stat. 834, 15 U. S. C. 79x, use the formula "any person [or party] aggrieved by an order of the Commission". The requirement of seeking a rehearing before the Commission prior to judicial review, however, tends to indicate that even here Congress assumed some kind of participation in the administrative proceedings on the part of the person seeking judicial review. Cf. *American Power & Light Co.* v. *Securities & Exchange Commission*, 325 U. S. 385, 388–391.

it affects indirectly the interests of a large body of others, such as competitors, consumers, shippers, stockholders, who, lacking a direct legal right, normally could not invoke the general equity jurisdiction of the federal courts. If the regulating body committed an error of law in favor of the regulated person, no one could obtain a correction of the order if equity principles of standing were invoked. Congress has therefore selectively authorized certain of those individuals indirectly or financially affected by regulatory action to seek review because "one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission". *Federal Communications Commission* v. *Sanders Radio Station,* 309 U. S. 470, 477; *Scripps-Howard Radio* v. *Federal Communications Commission,* 316 U. S. 4, 14; *Federal Communications Commission* v. *National Broadcasting Company,* 319 U. S. 239, 246–247; *American Power & Light Co.* v. *Securities and Exchange Commission,* 325 U. S. 385, 390. But most of these statutes give the right to judicial review only to parties to the administrative proceeding. The power to seek review in statutory proceedings is therefore limited to those who are directly regulated, or in selected instances to those who have an interest sufficiently substantial to justify their intervention in the administrative proceedings.[25]

[25] The theory justifying statutory judicial review at the suit of an adversely affected person whose own rights have not been invaded has been explained in *Associated Industries* v. *Ickes,* 134 F. 2d 694, 704 (C. A. 2), vacated as moot, 320

In short, prior to the Administrative Procedure Act, a person had standing to obtain judicial review (a) under the general equity jurisdiction of the federal courts, if he could show the invasion of a right or the violation of a duty owed to him; or (b) if he was an adversely-affected person within the meaning of a specific statute establishing a particular review procedure. In the latter case, he was able to obtain relief in the statutory proceeding, even if his interest was not strong enough to invoke the equity jurisdiction of the district courts directly.[26]

U. S. 707. The *Associated Industries* case which involved proceedings under the Bituminous Coal Act of 1937 (*supra*, p. 105, fn. 24) held that Congress could authorize a public official "such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public or the government". Similarly, Congress can authorize a non-official person to bring suit to prevent action by an officer in violation of his statutory powers. The adversely affected person or party thus is a private Attorney General or King's proctor (*Colorado Radio Corporation* v. *Federal Communications Commission*, 118 F. 2d 24, 28 (C. A. D. C., concurring opinion of Edgerton, J.)), charged with the vindication of the public interest in the proper administration of the law. *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U. S. 4, 14; *Associated Industries* v. *Ickes*, *supra* at 704; *Granik* v. *Federal Communications Commission*, 234 F. 2d 682, 684 (C. A. D. C.); *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741, 746–747, 748 (C. A. D. C.).

[26] Compare *City of Atlanta* v. *Ickes*, 308 U. S. 517, with *Associated Industries* v. *Ickes*, *supra*, pp. 106–107, fn. 25, at 701–702; cf. *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 934, fn. 20 (C. A. D. C.), certiorari denied, 350 U. S. 884; *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741, 748 (C. A. D. C.).

2. *Section 10 (a) of the Administrative Procedure Act is essentially a restatement of the pre-existing law as to standing.*

As noted above, Section 10 (a) of the Administrative Procedure Act provides:

> Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

The main question raised by this provision is whether it was designed to restate the existing law of standing, or whether it constitutes a blanket authority permitting any person adversely affected or hurt by agency action to challenge the legality of that action as a "private Attorney General". We submit that the former interpretation must be accepted.

a. The broader reading does not fit with the language Congress used. It would require the deletion of the crucial phrase "within the meaning of any relevant statute", and in the words of the Court of Appeals for the District of Columbia Circuit, "That view, of course, cannot be accepted". *Kansas City Power & Light Company* v. *McKay*, 225 F. 2d 924, 932, certiorari denied, 350 U. S. 884. That phrase indicates that, in enacting Section 10 (a), Congress did not intend to open "a vista of litigation hitherto unrevealed",[27] but rather left the question of whether indirectly-or-financially-injured-persons could obtain review to the specific substantive legislation which

[27] Cf. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 481, *supra*, p. 103.

in each case would establish procedures under which the administrative agency or the courts could determine whether the plaintiff's interest was substantial enough to justify his appearance as a private Attorney General.[28]

b. The legislative history of Section 10 (a) and subsequent congressional action in this area support this interpretation that the provision was designed to restate existing law.

(*1*). As a whole, the legislative history of the Procedure Act does not disclose any intent radically to depart from the rules on standing. It is true that there are some statements which might convey the impression that everyone "injured" by adverse administrative action was entitled to judicial review. We believe, however, that these passages were directed at the problem with which the Act was mainly concerned, *i. e.*, the relief available to a person directly affected by a regulatory order. Whenever the discussion was focused upon the issue here involved—the standing of one merely financially affected—the legislative proceedings make it clear that Section 10 (a) "reflects existing law".

The Senate Committee Report[29] commented on Section 10 (a) as follows:

> This subsection [Section 10 (a)] confers a right of review upon any person adversely affected in fact by agency action or aggrieved

[28] Cf. Civil Aeronautics Act, Section 1006, 49 U. S. C. 646, giving a right to seek review to any person "disclosing a substantial interest in such order".

[29] S. Rept. 752, 79th Cong., 1st Sess., p. 26; *Legislative History of the Administrative Procedure Act*, S. Doc. 248, 79th Cong., 2d Sess., p. 212.

> within the meaning of any statute. The phrase "legal wrong" means such a wrong as is specified in subsection (e) of this section. It means that something more than mere adverse personal effect must be shown—that is, that the adverse effect must be an illegal effect. The law so made relevant is not just constitutional law but any and all applicable law.

This statement is not at all clear. On the one hand, if taken literally, the explanation might mean that the mere fact that a person is injured by administrative action is not sufficient to afford him a right to review; the action must, in addition, violate some law. In that view, standing would depend upon the merits of the challenger's claim. On the other hand, the Committee's statement might well have been intended as a shorthand summary of the existing law on standing.[30] Other relevant materials in the history of the Act strongly suggest that the latter position is correct—that the Committees and Congress did not intend any radical departure from the existing rules.

One of the focal elements in the history of the Act is a letter to Senator McCarran, the Chairman of the Senate Judiciary Committee, from the Attorney General, in which the latter commented favorably on the then pending legislation. Attached to the letter was an appendix discussing the principal provisions

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[30] In *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, 197, fn. 6, the majority opinion relied on this explanation of Section 10 (a), and on the virtually identical analysis in House Report No. 1980, 79th Cong., 2d Sess., p. 42; *Legislative History of the Administrative Procedure Act*, *supra*, p. 109, fn. 29, p. 276.

of the bill. The Attorney General felt it "advisable" to transmit these comments to Congress so that it "may serve to clarify some of the essential issues and may assist the committee in evaluating the impact of the bill on public and private interests".[31] The Senate Committee incorporated the letter and appendix in its report;[32] they were read into the Congressional Record as an extension of remarks by Representative Hobbs because they were "so helpful";[33] and significant references to them were made in the Senate debate, in particular in connection with the standing problem (*infra*, pp. 113–115). In these circumstances, the Attorney General's letter and the appendix attached to it constitute an integral part of the legislative history of the Act and a useful tool in the determination of the purposes Congress sought to accomplish by the legislation. *American Stevedores* v. *Porello*, 330 U. S. 446, 452.

The comments in the appendix to the Attorney General's letter with respect to Section 10 (a) were:

> * * * This reflects existing law. In *Alabama Power Co.* v. *Ickes* (302 U. S. 464), the Supreme Court stated the rule concerning per-

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[31] S. Rept. 752, 79th Cong., 1st Sess., pp. 37–38; *Legislative History of the Administrative Procedure Act*, *supra*, p. 109, fn. 29, pp. 223–224.

[32] S. Rept. 752, 79th Cong., 1st Sess., pp. 5, 37–45; *Legislative History of the Administrative Procedure Act*, *supra*, p. 109, fn. 29, pp. 191, 223–231. The House Report in turn refers to the Senate Report, *infra*, p. 116, and the Attorney General, letter and the comments annexed to it.

[33] 92 Cong. Rec. A2982.

sons entitled to judicial review.[34] Other cases having an important bearing on this subject are: *Massachusetts* v. *Mellon* (262 U. S. 447),[35] the *Chicago Junction Case* (264 U. S. 258),[36] *Sprunt & Son* v. *United States* (281 U. S. 249),[37] and *Perkins* v. *Lukens Steel Co.* (310 U. S. 113).[38] An important decision interpreting the meaning of the terms "aggrieved" and "adversely affected" is *Federal Communications*

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[34] *Alabama Power Co.* v. *Ickes*, *supra*, pp. 102–103, holds that standing to challenge alleged illegal administrative action presupposes the direct violation of a legal right, not merely a financial disadvantage. The opinion stressed that, absent this limitation, the courts would be subject to a flood of unprecedented litigation (302 U. S. at 478–481).

[35] *Massachusetts* v. *Mellon*, *supra*, p. 101, fn. 16, holds that the courts have no power *per se* to review allegedly illegal or unconstitutional action, that such questions may be considered only as incidents to the determination of a case or controversy alleging the violation of a legal right, and that a taxpayer's financial interest is insufficient to create such standing (262 U. S. at 488).

[36] The *Chicago Junction Case*, *infra*, p. 125, holds that Congress may enlarge the scope of available judicial review by creating new substantive rights or new statutory special interests (264 U. S. at 266–267).

[37] *Sprunt & Son* v. *United States*, *supra*, p. 102, holds that, absent an independent legal right, a consignee of railroad shipments has no right to seek review of an order of the Interstate Commerce Commission addressed to certain railroads which deprived the consignee of certain competitive advantages (281 U. S. at 256–257).

[38] *Perkins* v. *Lukens Steel Co.*, *supra*, pp. 102–103, holds that a person holding Government contracts has no standing to challenge an allegedly illegal interpretation of the [Walsh-Healey] Public Contracts Act of 1936. It stresses that statutes which are not of a regulatory type but affect Government contracts and Government property are not intended to create any legal rights in third persons but constitute a self-imposed restraint, of the violation of which the Government, but not private litigants, can complain; that in this area the duties of the Government officials are owed exclusively to their superiors and to Congress (310 U. S. at 127–130).

Commission v. *Sanders Bros. Radio Station* (309 U. S. 470).[39]

The debate on the Administrative Procedure Act on the floor of the Senate[40] corroborates the strong inference, suggested by the Attorney General's letter, that Section 10 (a) was not designed to change existing law. In response to an inquiry by Senator Austin about the meaning of the phrase "legal wrong" in Section 10 (a), Senator McCarran, the Chairman of the Senate Judiciary Committee and author of the Committee Report,[41] first sought to explain that term on the basis of the committee report, *supra*, pp. 109–110, *i. e.*, as an adverse "illegal effect". Senator Austin took the position that this definition actually referred to the second part of the clause, *viz.*, "or adversely affected or aggrieved by such action within the meaning of any relevant statute." Senator Austin then read the definition of "wrong" from Bouvier's Dictionary, as meaning a "violation of right", including "[i]n its broad sense * * * every injury to another", and then continued:

> The combination of words used here is very significant. The adjective "legal" is a limiting adjective; and, as it has been applied in jurisprudence to "injury" it is defined as fol-

[39] *Federal Communications Commission* v. *Sanders Bros. Radio Station*, *supra*, p. 106, holds that Congress may specifically authorize a merely financially affected person to seek judicial review (309 U. S. at 477).

[40] 92 Cong. Rec. 2152–2153; *Legislative History of the Administrative Procedure Act*, *supra*, p. 109, fn. 29, pp. 308–310.

[41] S. Rept. 752, 79th Cong., 1st Sess., p. 1; *Legislative History of the Administrative Procedure Act*, *supra*, p. 109, fn. 29, pp. 186–187.

lows in Words and Phrases, fourth series, second volume, p. 548:

> "Legal injury" must be violation of some legal right and is distinct from "damage", which is harm, or loss, sustained by injury (*Combs* v. *Hargis Bank & Trust Co.* (27 S. W. (2d) 955, 956, 234 Ky. 202)).[42]

For the sake of the future of those practicing under the estimable bill, I think it would be well to have the RECORD show whether the distinguished author of the bill regards the category of persons entitled to review which is here described, that is, "any person suffering legal wrong" as any person who has suffered in the manner described in the quotation from Bouvier's Law Dictionary.

Mr. McCarran. Taking Bouvier and Words and Phrases combined, and taking the decisions of the courts of last resort, to whose language we have access, I should answer the Senator "yes". That is, I take into consideration all the definitions which apply to define that term, and I respectfully refer to the committee report, which I read a moment ago. It means that something more than mere adverse personal effect must be shown; that is, the adverse effect must be an illegal effect. So, to Bouvier, to Words and Phrases, and to the decisions to which the able Senator refers, I also add the expression contained in the committee report.

Mr. Austin. I thank the Senator.

Mr. McCarran. Let me go a little further, because I am very grateful to the Senator for

[42] The issue in *Combs* v. *Hargis Bank & Trust Co.* was whether the negligent and careless burning of a building constituted an injury to real property within the meaning of a venue statute.

> bringing up this question. We asked the Attorney General and the Department of Justice to comment on this bill. I now read the Attorney General's comment: * * *.

Senator McCarran then read the comment (*supra*, pp. 111–112), including the statement that Section 10 (a) reflects existing law, as well as the references to *Alabama Power Co.* v. *Ickes*, *Massachusetts* v. *Mellon*, the *Chicago Junction Case*, *Sprunt & Son* v. *United States*, *Perkins* v. *Lukens Steel Co.* and *Federal Communications Commission* v. *Sanders Bros. Radio Station*, and continued:

> Mr. President, I have referred the Senator to that expression coming from the Attorney General, in connection with this bill, to indicate to him and to the Senate the meticulous study which we have tried to give to this bill, so that we may construe the terms in such a way that there may be no divergence of views when we get through.
>
> I realize that the layman says this is an intricate bill. In a way it is, and yet in a way it simplifies itself in practice.

It is significant that, by defining "legal injury" as the violation of some legal right, the colloquy between the Senators employed the same legal terminology which had previously been utilized by this Court. And if Senator McCarran had disagreed with the Attorney General's statement that Section 10 (a) "reflects existing law", he would not have read it into the Congressional Record as a guide to future practitioners.

The explanation of Section 10 (a) in the House Report [43] uses language similar to that found in the Senate report (*supra*, pp. 109–110); the report also refers to the Senate Report and, in particular, to the Attorney General's letter and to his "more detailed statement which accompanies it".[44] The analysis of the Act on the floor of the House by Representative Walter [45] explained Section 10 (a) substantially in the terms of the committee report.[46] In contrast to the proceedings in the Senate, there was no clarifying debate. However, the Attorney General's letter, together with its appendix, were inserted in the Congressional Record because they were "so helpful" (*supra*, p. 111).

The Attorney General's letter, with its unambiguous statement that Section 10 (a) "reflects existing law"—quoted in the Senate Committee Report and on the floor of the Senate, incorporated by reference into the House Committee Report, and read into the Congressional Record of the House proceedings—thus cannot be disregarded in the interpretation of Section 10 (a). Similarly, that Section must be read in the light of the prior decisions of this Court, relating to the standing problem, which were explicitly brought to the attention of Congress. *Overstreet* v. *North*

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[43] H. Rept. 1980, 79th Cong., 2d Sess., p. 42; *Legislative History of the Administrative Procedure Act*, *supra*, p. 109, fn. 29, p. 276.

[44] H. Rept. 1980, *id.* at 16; *Legislative History of the Administrative Procedure Act*, *supra*, p. 109, fn. 29, at 250.

[45] The author of the House Report, H. Rept. 1980, *id.* at p. 1; *Legislative History of the Administrative Procedure Act*, *supra*, p. 109, fn. 29, p. 235.

[46] 92 Cong. Rec. 5654; *Legislative History of the Administrative Procedure Act*, *supra*, p. 109, fn. 29, p. 369.

Shore Corporation, 318 U. S. 125, 132. There is nothing in the debates disavowing the Attorney General's clear and positive statement at a time when the Congress' attention was drawn directly to the complexities of the standing problem.

The conclusion must be, we submit, that Section 10 (a) re-enacts the dichotomy already existing in the law:—the clause "[a]ny person suffering legal wrong because of any agency action" refers to the pre-existing equity jurisdiction of the courts and the statutory provisions so phrased; the clause "or adversely affected or aggrieved by such action within the meaning of any relevant statute" relates to the specific statutory review proceedings conferring standing on adversely-affected persons.[47] Congress thus heeded the warning contained in the Final Report of the Attorney General's Committee on Administrative Procedure (at p. 85) not to attempt to define any general classification of persons who shall have standing to challenge administrative action. The Report pointed out that the standing problem had been dealt with by the courts and Congress with an eye to the particular problems presented in each individual situation, and that any attempt to go beyond that would be either "futile or dangerous." The Report also noted (at p.

[47] A person who is "adversely affected or aggrieved * * * within the meaning of any relevant statute" thus has standing to sue not by virtue of the Administrative Procedure Act but as the result of the separate substantive legislation. This interpretation, however, does not render that clause mere surplusage. If Section 10 (a) had referred only to persons suffering legal wrong, it might have been construed as repealing existing statutory review provisions authorizing actions by adversely affected persons.

80) that "The objections to judicial review have been generally not to its availability but to its scope". Congress incorporated this finding in the explanation of Section 10 (e) in the Senate Judiciary Committee's Print of the bill.[48]

(*2*). The decisions of this Court in *Heikkila* v. *Barber*, 345 U. S. 229, and *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, are not to the contrary. The issue in those cases was not at all the problem of standing, but rather the availability of a new remedy—that of declaratory judgment in lieu of habeas corpus—so that the alien (who concededly had standing) could test the validity of a deportation order without first submitting to incarceration. No ruling of this Court holds that the Administrative Procedure Act enlarges standing so as to confer that right on persons in respondents' position.

(*3*). Six years after the enactment of the Administrative Procedure Act, Congress showed that Section 10 (a) of that Act was not designed to confer a blanket authorization to seek judicial review as a private Attorney General upon every person adversely affected or hurt by agency action, but that, absent the invasion of a "legal right", financially-

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[48] *Legislative History of the Administrative Procedure Act*, *supra*, p. 109, fn. 29, p. 39.

Similar statements were made before the House Judiciary Committee by Carl McFarland, then Chairman of the American Bar Association's Special Committee on Administrative Law. *Legislative History of the Administrative Procedure Act*, *supra*, p. 109, fn. 29, p. 84, "we do not believe that the principle of review or the extent of review can or should be greatly altered." See also *Legislative History of the Administrative Procedure Act*, *supra*, fn. 29, at 311, 369 and 415.

aggrieved persons could obtain judicial review only if specifically authorized by statute. The occasion was the Fulbright Amendment to the Defense Production Act Amendments, 1952, Section 301, 66 Stat. 308, 41 U. S. C. 43a.

We have several times referred above (*supra*, pp. 48–49, 51, 102–103, 112, fn. 38) to *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, which held that a Government contractor has no standing to challenge administrative determinations under the Walsh-Healey Public Contracts Act of 1936. Certain members of Congress disagreed with some of the substantive interpretations of the statute by the Secretary of Labor. Congress, however, never amended the Act. In 1952, it was felt that the courts should be given an opportunity to determine whether the administrative practice complied with the statutory command (98 Cong. Rec. 6531). Review of these determinations at the suit of a contractor financially prejudiced by the administrative action would, of course, have been possible if Section 10 (a) actually authorized every adversely-affected person to challenge administrative action in the absence of a specific statutory permission. Congress felt that this was not the case, and that it was necessary to amend the Walsh-Healey Act by expressly permitting any person adversely affected or aggrieved by certain orders of the Secretary of Labor to seek judicial review within 90 days.[49]

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[49] For a decision interpreting this legislation, see *Mitchell* v. *Covington Mills*, 229 F. 2d 506 (C. A. D. C.), certiorari denied, 350 U. S. 1002, and in particular the concurring opinion of Danaher, J., relating to the standing problems raised even by

This incident shows that Congress itself interprets Section 10 (a) as not conferring, in itself, standing to challenge administrative action upon anyone "adversely affected or aggrieved" thereby, but as restating the existing law, as set forth *supra*, pp. 101–107, 111–112. The Court of Appeals for the District of Columbia Circuit has come to the same conclusion. *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 932–934, certiorari denied, 350 U. S. 884; *Benson* v. *Schofield*, 236 F. 2d 719, 722–723, certiorari denied, 352 U. S. 976.[50]

3. *Respondents have no standing because the Canal Zone Code does not establish a statutory review procedure for the benefit of persons adversely affected or aggrieved, and they have not suffered a legal wrong.*

Admittedly, the Canal Zone Code does not provide any special statutory review proceeding. Respondents thus have standing to challenge the legality of petitioner's administrative action only if their financial interest in having the Canal tolls computed according to the statutory formula rises to the dignity of a "legal right". This it does not do.

a. *Respondents do not have standing by virtue of a user's right to reparations for unreasonable charges exacted by a public utility.* One of the touchstones suggested for the solution of the issue of standing in individual cases is whether the litigant would have

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this type of specific legislation. See, also, *Ruth Elkhorn Coals, Inc.* v. *Mitchell*, 248 F. 2d 635 (C. A. D. C.), pending on petition for a writ of certiorari, No. 704, this Term.

[50] See Carrow, *Types of Judicial Relief from Administrative Action*, 58 Columbia Law Rev. 1, 4 (Jan. 1958).

a remedy against a private person who took similar action. On this view, the question is whether, in analogous circumstances, the user of a privately-owned canal could compel its owner to initiate proceedings designed to lower its tolls for the future.

(*1*). At common law, a public utility had the duty not to make unreasonable charges. This duty was enforceable through damage actions or reparation proceedings in which the user could recover the excess of the amount actually paid over the reasonable rate. *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad*, 145 U. S. 263, 275; *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436. But we know of no decision which authorized a user to bring mandamus proceedings or otherwise to compel the utility to lower its rates prospectively.

(*2*). The crux of this case, however, is not that petitioner charges an unreasonable rate, but that it fails to compute the rate according to a statutory formula which is far lower than the "reasonable" rate. It is established that the enactment of such a statutory procedure for the determination of rates supersedes the common law remedy of reparation and damages, and that, unless the statute gives a right of action to all affected persons, a user has no standing. Respondents thus would not have a judicial remedy if petitioner were a private canal company.

(*i*). Respondents seek statutory, not reasonable, tolls. Significantly, the complaint does not ask that petitioner be ordered to prescribe reasonable tolls (R. 8). It alleges that the tolls charged by pe-

titioner are not computed according to law, the statutory toll formula, or the Comptroller General's Report for 1954 (R. 5–7). Respondents now seek to avoid this difficulty by claiming that the toll formula represents a statutory definition of what constitutes reasonable tolls in the common law sense (cf. Respondents' Brief in Opposition in No. 251, p. 5). This interpretation, however, is utterly at variance with the basic elements of a normal reasonable rate established by this Court. According to those tests, a reasonable rate permits the utility to recover all of its operating expenses, depreciation which includes allowances for wear and tear, inadequacy and obsolescences, and finally a reasonable return on the investment. *Lindheimer* v. *Illinois Telephone Co.*, 292 U. S. 151, 164, 167; *Federal Power Commission* v. *Hope Gas Co.*, 320 U. S. 591, 605. Respondents, in contrast, claim that the toll formula calls for the operation of the Canal at cost, without any allowances for a return on the investment and obsolescence.[51]

Again, the core of this litigation centers around respondents' contention that the deficit of the supporting business organizations is not recoverable through tolls. However, their main reliance in their complaint and their motion for summary judgment—the Comptroller General's Report (*supra*, pp. 7–8, fn. 8;

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[51] Canal Zone Code, Title 2, Section 253, *infra*, p. 156, which provides for the payment of dividends, indicates that the Canal was not supposed to be operated at cost. During the six years of its existence, petitioner has paid two dividends totalling $15,000,000 ($10,000,000 during the fiscal year of 1955 and $5,000,000 during the following fiscal year (H. Doc. 351, 84th Cong., 2d Sess., p. 5, see also H. Doc. 99, 85th Cong., 1st Sess., p. 5.))

p. 23)—takes the position that this deficit constitutes a legitimate expense in the operation of the Canal; and the Comptroller General has recommended strongly that the toll formula be amended to include this item (*supra*, pp. 19–20). A rate which does not permit the recovery of a legitimate business expense is obviously not a "reasonable rate", as that term is commonly understood.

(*ii*). As we have just pointed out, respondents' claim is not based upon petitioner's alleged violation of a common law duty to charge no more than a reasonable rate, but on the theory that petitioner violated the provisions of the statute determining its tolls. Such a statute supersedes the common law right for reparations unless the latter has been preserved expressly, as *e. g.*, in Section 22 of the Interstate Commerce Act (49 U. S. C. 22). *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 446–447. Respondents therefore cannot rely on any alleged common law right to sue.

In addition, statutes of this type do not, unless express provision is made, give a user the right to sue. Such statutes determining the rates which a public utility may charge are enacted, not for the specific benefit of the user, but on account of the impact of excessive charges on the public as a whole. The rate determination takes into consideration not only the interests of the utility and the user, but also those of competing facilities, and of the competitors of users.[52] The duty of the utility to comply

[52] Cf. the statement by this Court that regulatory legislation is designed to establish public, not private, rights. *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 362.

with a rate-determining statute is not owed to its users but to the public at large. The user's interest in the proper administration of a rate-determining statute does not differ from that of the general public (see *supra*, p. 101), and is not sufficient to confer standing upon him unless the statute does so expressly. *City of Atlanta* v. *Ickes*, 308 U. S. 517; *Stark* v. *Wickard*, 321 U. S. 288, 319 (dissenting opinion),[53] *Louisiana* v. *McAdoo*, 234 U. S. 627, 631–632;[54] cf. *Associated Industries* v. *Ickes*, 134 F. 2d 694, 702 (C. A. 2), vacated as moot, 320 U. S. 707; *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 934, fn. 20 (C. A. D. C.), certiorari denied, 350 U. S. 884. *United States* v. *Public Utilities Commission*, 151 F. 2d 609 (C. A. D. C.), cited by the court below,[55] recognizes a consumer's standing to challenge a rate determination by a public utility commission, but

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[53] The majority opinion did not contest this statement but held that the plaintiff had standing because a specific legal interest, going beyond that of a user or consumer, had been invaded; cf. 321 U. S. at 305, 308–310.

[54] A consumer has no standing to complain of excessive customs levies.

[55] Cf. R. 256, fn. 36. The other two cases cited in that note are likewise not of any assistance to respondents. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, states that the user's common law right to reparations is superseded by legislation determining the rates to be charged by the utility (*supra*, p. 123). *Richman* v. *Consolidated Gas Co. of New York*, 114 App. Div. 216, affirmed, 186 N. Y. 209, involves standing under New York law, and, hence, has no bearing on the special standing problems under the Federal Constitution. *Tyler* v. *Judges of the Court of Registration*, 179 U. S. 405, 410; *Coleman* v. *Miller*, 307 U. S. 433, 466 (concurring opinion); *Doremus* v. *Board of Education*, 342 U. S. 429, 432–434.

only because the statute (D. C. Code § 43–705) in terms conferred this right on any person "affected". It has been held in cases closely analogous to this litigation that a passenger and an employee of a privately-owned ferryboat route lack standing to complain of its abandonment, and that users of a county bridge lack any right "peculiar to themselves" which would enable them to complain of the legality of the tolls collected for its crossing. *Johnson* v. *Chesapeake & O. Ry. Co.*, 188 F. 2d 458 (C. A. 4), certiorari denied, 342 U. S. 833; *Lawless* v. *Duval County*, 6 F. Supp. 303 (S. D. Fla., statutory court). Under this line of decisions, respondents could not challenge the legality of the canal tolls, even if petitioner were a wholly private corporation.

b. *There are no statutory or treaty provisions designed to confer standing upon respondents.* As we have just developed, a rate-determining statute usually is designed to serve the interests of the public at large, not to create any specific enforceable rights in those who would benefit from its proper enforcement. Occasionally, however, this Court has found legislation establishing a direct substantive right in the beneficiary of a regulatory statute. The most famous instance is the *Chicago Junction Case*, 264 U. S. 258, 266–267, which held that the Interstate Commerce Act had conferred upon the competitors of a railroad a special interest, capable of judicial enforcement. Statutes of this type are rare,[56] and respondents can-

[56] Cf. the discussion of the *Chicago Junction Case* in *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 483–484.

not show any statute or treaty designed to confer upon them any such specific enforceable rights.

(*1*). The Act of 1950 certainly did not confer upon respondents any specific right to have the tolls computed according to the formula of Sections 411 and 412. We have pointed out in detail that the 1950 Act is legislation concerning the administration of public property (*supra*, pp. 45–49). Such statutes envisage enforcement by the political branches of the Government (*supra*, pp. 47–49). Indeed, they have been described not as ordinary legislation but as "mere rules prescribed by an owner of property * * *". *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 474, *supra*, p. 48. The usual purpose to be inferred from such rules is that the owner confers upon the users of his property privileges which are revocable at will. He does not normally intend to create any vested rights.

The nature of the legal relations created by legislation dealing with the management of Government property and with Government contracts has been analysed in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113.[57] The Court held that such statutes constitute "a self-imposed restraint for violation of which the Government—but not private litigants—can complain" and that it "was not intended to be a bestowal of litigable rights upon those desirous of selling to the Gov-

[57] For the continued vitality of the considerations underlying the *Perkins* case, see *supra*, p. 119. It will be remembered that this case was among those cited to Congress at the time of the enactment of the Administrative Procedure Act as having "an important bearing" on the standing problem (*supra*, pp. 111–112, 115). Cf. *Overstreet* v. *North Shore Corporation*, 318 U. S. 125, 132, *supra*, pp. 116–117.

ernment"[58] (310 U. S. at 127). The duties of the Government officials in this area are "owing to the Government and to no one else" (310 U. S. at 126); their "responsibility is to superior executive and legislative authority" (310 U. S. at 129).[59] Statutes dealing with the administration of public property are not designed to create any specific rights in the potential users. Their interest in the proper execution of those laws is not distinguished from that of the general public (310 U. S. at p. 125), and hence, is insufficient to confer standing to sue (*supra*, pp. 101–102).

The general rule negativing the purpose to create enforceable legal rights in this area is re-enforced by the particular statutory plan for the Canal tolls. We have first the "essential" presidential power to modify the computation of the tolls based upon the formula (*supra*, pp. 55; 66–67). Similarly, it was anticipated that Congress would authorize or require departures from the statutory toll formula if the circumstances necessitated such action;[60] this double reservation of the power of modifying the tolls suggests that Congress never intended to confer upon the users of the Canal any rights which might be enforceable in judicial proceedings.

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[58] Or, in this case, "those desirous of using Government property".

[59] We have shown (*supra*, pp. 49–53) the effectiveness of petitioner's supervision by the President and Congress.

[60] *Supra*, pp. 55–56 and see *Authorization and Provision for the Maintenance and Operation of the Panama Canal*, Hearings before the Subcommittee on the Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives, 81st Cong., 2d Sess., on H. R. 8677, pp. 49–50, see also District Court Opinion, fn. 20a, R. 223–224.

Furthermore, if Congress had intended to provide for judicial review of petitioner's rate determinations, it would have established administrative proceedings following the well established pattern, *i. é.*, for a hearing prior to the rate determination,[61] in which all interested parties can submit evidence, and for statutory review proceedings (following petitioner's decision) by any party adversely affected. The total absence of any of the now familiar administrative and review procedures which would permit the adequate representation of the various conflicting interests indicates that Congress did not intend to create in respondents any rights which might be vindicated in court.

And, as we have already suggested (*supra*, pp. 103–104), if the statute were construed as conferring specific legal rights, respondents would not be the only ones who could challenge petitioner's administration of the statute. The transcontinental railroads, whose interests were carefully respected by Congress,[62] could complain that the tolls were too low. Shippers on transcontinental railroads could assert that if the Canal tolls were lowered, the railroads would be com-

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[61] Section 411 calls for a hearing *following* the prescribing of new tolls by petitioner.

[62] See *supra*, pp. 66–67. Congress eliminated a $1.00 ceiling on the toll formula to which the railroads had objected. See, *e. g.*, *Maintenance and Operation of the Panama Canal*, Hearing before a Subcommittee of the Committee on Armed Services, United States Senate, 81st Cong., 2d Sess. on H. R. 8677, pp. 27–29 (R. 142–144); S. Rept. 2531, 81st Cong., 2d Sess., p. 4 (R. 165).

pelled to lower their rates. Probably, none of these competing interests would ever concede that the tolls complied with the statutory formula at any given moment. This consideration "places in bold relief" the potentialities which necessarily arise if legislation of this type is construed as conferring judicially enforceable rights (cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, at 131, see also *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 480–481; and *supra*, pp. 103–107).

(*2*). Respondents have no standing to sue by virtue of the Hay-Pauncefote Treaty. Pursuant to Art. III of the Hay-Pauncefote Treaty, 32 Stat. (Pt. 2) 1904, *supra*, pp. 6–7, the United States agreed with the United Kingdom that the conditions and charges for the Panama Canal "shall be just and equitable". We have shown (*supra*, pp. 121–123) that respondents' complaint is not that the toll charges are unreasonable, unjust or inequitable, but merely that they do not comply with respondents' interpretation of a statutory formula—which would give them a windfall and would result in an unintended substantial annual subsidy of the Canal operations by the American taxpayer (*supra*, pp. 19–20).

More fundamental, however, is the consideration that treaty obligations assumed by the United States do not confer any specific rights upon American citizens.[63] Basically, the rules of international law are binding upon, and create rights between sovereign na-

[63] According to the allegations of the complaint, respondents are all corporations organized under the laws of states of the United States (Complaint, par. 1, R. 4).

tions. Occasionally, a treaty provides that the obligations assumed by one country run directly to the citizens of the other contracting power.[64] A state, however, does not assume any obligation towards its own citizens when it enters into a treaty with a foreign country. This Court has held that "International law * * * [is] concerned with international rights and duties and not with domestic rights and duties", and that an American citizen is "not in a position to invoke the rights of other governments or of the nationals of other countries." *Skiriotes* v. *Florida,* 313 U. S. 69, 72–74.

Thus, the only obligations of the United States created by the Hay-Pauncefote Treaty are international treaty rights running in favor of the United Kingdom. This country has always taken the position that the Treaty conferred rights only on the two signatory powers.[65] The reference to the Hay-Pauncefote Treaty in Section 412 (d) of the Canal Zone Code (*infra,* p. 169) obviously means no more than that, in prescribing tolls, petitioner has to respect the international duties owed to the United Kingdom. There is no indication of an intent to convert this international obligation into a specific duty owed by the Canal Company to citizens of the United States. Such an

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[64] Borchard, *Diplomatic Protection of Citizens Abroad,* 18; Oppenheim's *International Law* (Seventh Ed. by Lauterpacht), Vol. I, Secs. 13a, 289, 520.

[65] See the statement of Senator Root on the floor of the Senate, 51 Cong. Rec. 8955, and see Communication of Secretary of State Hughes to President Harding, Hackworth, *Digest of International Law,* Vol. V, pp. 221–222; Hyde, *International Law* (2d Rev. Ed.), Vol. II, Section 529A, fn. 9.

unusual grant could be found only upon the basis of far more convincing evidence than exists here.

II

THE COURT OF APPEALS ERRED IN AWARDING SUMMARY JUDGMENT TO RESPONDENTS

Assuming, for the sake of argument, that the courts had jurisdiction to entertain these proceedings, the court below erred in directing summary judgment for respondents. Respondents' motion for summary judgment was stayed, and petitioner had been excused from answering it. Any disposition of that motion was premature. On the other hand, we submit that if the court below felt that it had jurisdiction, it should have dismissed the proceedings on the merits because respondents cannot succeed.

A. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT

1. *The posture of the case.* The complaint in this case was filed on September 13, 1955 (R. 1). Petitioner's time to file its answer expired on November 12, 1955 (Rule 12 (a), Federal Rules of Civil Procedure). On October 28, 1955, *i. e.*, before the time to answer had expired, respondents obtained an order to show cause for summary judgment (R. 10). The papers supporting this order to show cause constituted a heavy volume containing some 60 pages of affidavits and over 500 pages of congressional and administrative documents, hearings, and reports.[66] The

[66] The papers supporting the order to show cause have been printed only in part. R. 10–185.

affidavit in support of the order to show cause itself conceded that the matter was not suitable for summary disposition. It pointed out that, under the Federal Rules of Civil Procedure (Rule 6d), petitioner's affidavits in opposition would be due only the day before the hearing and that, in view of the complexity of the case, respondents needed more than the day contemplated by the Rules to prepare its reply affidavits and brief (R. 38).

In spite of the representation implicit in the motion for summary judgment that the case did not present any genuine issue of fact, respondents, on November 10, 1955, initiated extensive discovery proceedings. They filed requests for admissions, interrogatories, as well as notices of deposition, and served subpoenas *duces tecum* on the Comptroller General and on William Newman, an official in the General Accounting Office (R. 1–2, 209–210, 212–213).[67]

On December 16, 1955, petitioner moved to dismiss the complaint for lack of jurisdiction and for failure to join an indispensable party (R. 185). This motion was supported by a brief affidavit (R. 186–195). Petitioner took the position that orderly procedure required the question of jurisdiction to be settled before the case proceeded any further on the merits (R. 197). It moved to stay the discovery proceedings and the motion for summary judgment so that it would be

[67] The reason given for these discovery proceedings was respondents' belief that petitioner's General Counsel had disagreed with petitioner's management on the interpretation of Sections 411 and 412, and their desire to obtain evidence of this internal disagreement (R. 203).

spared the monumental job of answering the weighty document filed by respondents with their summary judgment motion, unless it appeared that the court had jurisdiction (R. 196–197, 205).

The District Court granted the stay motions for the very purpose of obviating the need to answer the complex motion for summary judgment while the jurisdictional issue remained undetermined (R. 205, 207–210, 211–213). It specifically stated that upon the hearing of the motion to dismiss:

> * * * the only answer that you [the parties] can get is either (1) we can't even hear it, or (2) we can hear it; and if we conclude we can hear it, there will be a fresh slate and a fresh start on who is right and who is wrong. [R. 202.]

Respondents' motion for summary judgment was subsequently marked off the calendar (R. 185).

2. *Since respondents' motion for summary judgment was not before the District Court, the Court of Appeals erred in directing entry of summary judgment for respondents.* The direction of summary judgment by the Court of Appeals disregarded the precepts of this Court that issues of public moment should not be decided on affidavits in proceedings which do not permit the probing of the evidence by judge and opposing counsel, and which lack "the safeguards of critical scrutiny of the facts", *Eccles* v. *Peoples Bank,* 333 U. S. 426, 434. And apart from this fundamental consideration that courts should not pass on issues of the type here involved "without the

fullest disclosure of all material facts",[68] the Court of Appeals, by awarding summary judgment, passed on a motion which was not before it, and deprived petitioner of all opportunity to answer that motion.

The ruling of the District Court was expressly limited to petitioner's motion to dismiss for lack of jurisdiction (R. 202, 208, 212–213). As we have shown (*supra*, p. 133), the District Court specifically denied any intention of passing on respondents' motion for summary judgment; accordingly, it stayed that motion, excused petitioner from answering it, and marked it off the calendar. The Court of Appeals thus granted a motion which had not been considered by the District Court, and which petitioner had not answered, in reliance upon the District Court's rulings. This constituted fundamental procedural error. *Fountain* v. *Filson*, 336 U. S. 681, 683; *Kaku Nagano* v. *McGrath*, 187 F. 2d 759, 768 (C. A. 7), affirmed, 342 U. S. 916.

It will not do to argue that petitioner's motion to dismiss actually constituted a motion for summary judgment because it was supported by an affidavit. First, motions to dismiss under Rule 12 (b) (1)–(5) and (7), Federal Rules of Civil Procedure, always could, and usually have to, be made in the form of a speaking motion. The provision of Rule 12 (b) which transforms a motion to dismiss, supported by an affidavit, into a motion for summary judgment is limited in terms to motions under Rule 12 (b) (6), the old speaking demurrer. Moore, *Federal Practice* (2d

[68] *Chicago, etc., Ry. Co.* v. *Wellman*, 143 U. S. 339, 345–346.

Ed.), Vol. 2, Section 12.09, pp. 2247–2257. Second, even if the Court of Appeals felt that the District Court had erred in not treating the two motions as cross-motions for summary judgment, it still lacked power to award summary judgment to respondent without giving petitioner an opportunity to dispute the facts material to that motion. *Fountain* v. *Filson,* 336 U. S. 681, 683.

B. IF THE COURTS HAVE JURISDICTION OVER THE SUBJECT MATTER OF THIS ACTION, THE COMPLAINT SHOULD BE DISMISSED BECAUSE RESPONDENTS CANNOT SUCCEED ON THE MERITS

Even if this Court should conclude that the courts have jurisdiction over the subject matter, the proper disposition of this case would be to dismiss it on the merits, rather than to remand it to the District Court for further proceedings.

The ultimate issue upon which respondents' case turns is whether the deficit of the supporting business activities of the Canal constitutes a cost element to be considered in the computation of the Canal tolls. If this question is answered in the affirmative, respondents cannot prevail on the merits, and a remand of the case to the District Court would constitute an idle gesture. Where a reviewing court finds an insurmountable objection to the maintenance of the action, it will dismiss, rather than remand, the proceedings and terminate the litigation. *Deckert* v. *Independence Shares Corporation,* 311 U. S. 282, 287; *Myers* v. *Bethlehem Corp.,* 303 U. S. 41, 52–53 and the authorities there cited.

Respondents cannot establish that the deficit of the supporting business activities does not constitute

a cost element recoverable through Canal tolls. In the part of this brief which dealt with the mandamus jurisdiction of the courts, our burden was merely to show that petitioner's interpretation of the statute was a plausible and reasonable one (*supra*, pp. 84–89). We submit that we have gone farther and established there that petitioner's reading of the statute is correct. However, if there be any question, it is apparent that Congress has ratified the administrative interpretation of the statute.

Congress has been fully advised of the administrative interpretation of Sections 411 and 412 by the Panama Canal Company. Petitioner explained its position to Congress even before May 16, 1955, the day the Comptroller General's Audit Report for 1954 was filed with Congress.[69] Subsequently, a spokesman for respondents presented their case before a congressional committee.[70] Again, in 1956, when advised

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[69] Cf. *Operations of the Panama Canal Company, etc.*, Hearings before Subcommittee No. 3, Panama Canal, of the Committee on Merchant Marine and Fisheries, House of Representatives, 83d Cong., 2d Sess., June–July, 1954, pp. 8–10; *Study of the Operations of the Panama Canal Company, etc.*, Hearings before the Committee on Merchant Marine and Fisheries, House of Representatives, 84th Cong., 1st Sess., March 29, 30, and 31, 1955, p. 103.

[70] *Changes in the Administration of the Panama Canal Company*, Hearings before the Subcommittee on Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives, 84th Cong., 1st Sess., on H. R. 6917, etc., pp. 6, 22–23. For the petitioner's reply, see pp. 160–161. Petitioner's position was submitted to the corresponding Senate committee in *Panama Canal* (*Changes in Administration*), Hearings before the Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 84th Cong., 2d Sess. on S. 2167, pp. 68–70, 90–92.

of the pendency of this litigation, one member of the House Committee of Appropriations (Representative Thomas) took the position that the shipping interests were fighting a preventive war by suing for $27 million while they should be paying $50 million more; another (Representative Miller) considered that it was unrealistic that the Canal rates had not been increased since 1937 [71] and that they were lower than those charged for the Suez Canal.[72]

In view of the close scrutiny by Congress over petitioner's administration of the Canal, and of its interpretation of the toll formula,[73] the enactment of three appropriation acts approving petitioner's budget,[74] after having been advised of this controversy, constitutes congressional ratification of petitioner's in-

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[71] *Department of Commerce and Related Agencies Appropriations for 1957*, Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 84th Cong., 2d Sess., pp. 691, 693, 696–697. See also the remarks of Senator Ellender on the floor of the Senate, 101 Cong. Rec. 7743, and the congressional inquiry into the alleged inadequacy of the canal tolls, *supra*, pp. 17–18.

[72] The Suez Canal does not require expensive lock operations.

[73] *Supra*, pp. 17–18, 50, 53, 55–56. Cf. *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 544–545, fn. 12; *United States* v. *Allen-Bradley Co.*, 352 U. S. 306, 310.

[74] The Comptroller General's Report for 1954 was transmitted to Congress on May 16, 1955 (R. 40). Since then, Congress has approved the Department of Commerce and Related Agencies Appropriations Acts for 1956, 1957 and 1958 which include petitioner's budgets based upon its interpretation of the statute. 69 Stat. 235–237; 70 Stat. 322–324; 71 Stat. 78.

terpretation of the toll formula.[75] *Brooks* v. *Dewar*, 313 U. S. 354, 361; *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 116; *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 544–545; see also *United States* v. *Allen-Bradley Co.*, 352 U. S. 306, 310–311 and *United States* v. *Korpan*, 354 U. S. 271, 276–277.[76] In these circumstances, a remand to the District Court for further proceedings would constitute a "[p]lain waste of time, effort and money * * *".[77]

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[75] This Court can take judicial notice of these facts, established by legislative documents, such as congressional hearings, reports, and statements made on the floor of the legislature. *Arizona* v. *California*, 283 U. S. 423, 453, fn. 3; *United States* v. *McFarland*, 15 F. 2d 823, 833 (C. A. 4), certiorari granted, 273 U. S. 688, revoked, 275 U. S. 485; *Louisville Gas & Electric Co.* v. *Federal Power Commission*, 129 F. 2d 126, 134 (C. A. 6), certiorari denied, 318 U. S. 761; *Porter* v. *Murray*, 156 F. 2d 781, 786 (C. A. 1), certiorari granted, 329 U. S. 705, dismissed *sub nom. Murray* v. *Fleming*, on motion of petitioner's counsel, 330 U. S. 804; *Osage Nation* v. *United States*, 119 C. Cls. 592, 633, certiorari denied, 342 U. S. 896. These facts may be noted judicially although many of them occurred after the hearing in the District Court had been closed. *Savannah River Electric Co.* v. *Federal Power Commission*, 164 F. 2d 408, 410 (C. A. 4).

[76] See also the rulings to the effect that the courts generally refuse to repudiate an administrative interpretation of a statute which has clearly been brought to the attention of Congress and which Congress, although urged to do so, has refused to correct. *Alstate Construction Co.* v. *Durkin*, 345 U. S. 13, 17; *Mitchell* v. *Covington Mills*, 229 F. 2d 506, 509 (C. A. D. C.), certiorari denied, 350 U. S. 1002; *Ruth Elkhorn Coals, Inc.* v. *Mitchell*, 248 F. 2d 635 (C. A. D. C.), pending on petition for a writ of certiorari, No. 704, this Term.

[77] *Benson* v. *Schofield*, 236 F. 2d 719, 721 (C. A. D. C.), certiorari denied, 352 U. S. 976.

III

THE DISTRICT COURT AND THE COURT OF APPEALS BOTH HELD CORRECTLY THAT THEY LACKED JURISDICTION TO THE EXTENT THAT THE COMPLAINT SEEKS TO RECOVER ANY ALLEGEDLY EXCESSIVE TOLLS COLLECTED IN THE PAST

Respondents' complaint seeks to accomplish two things. First, to compel the lowering of the Canal tolls prospectively, and, second, to obtain a refund on the tolls paid in the past to the extent that they exceeded the charges payable under the tolls formula, as respondents construe that formula. For this purpose, respondents ask that the court impress a trust upon the tolls collected in excess of the alleged statutory rate and that it award a damage judgment (R. 9). Both courts below have dismissed this portion of the complaint for lack of jurisdiction. We agree, of course, with this disposition of this aspect of the case, which is the subject of the cross-petition for certiorari in No. 252.

A. Respondents base their refund claims on the common law rule that a user of a public utility from whom an unreasonable charge has been exacted may recover the excess over the reasonable charge. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 436; *Arizona Grocery* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 284 U. S. 370, 383. This analogy fails for a number of reasons.

First, petitioner is not a mere public utility but an agency and instrumentality of the United States (Canal Zone Code, Section 245, *infra*, p. 164). Hence,

any duty to charge reasonable rates is owed to petitioner's superior executive and legislative authority (*supra*, pp. 126–127), not to the Canal users. This consideration eliminates the very basis of the common law remedy predicated upon a duty owed by the utility to the user.

Second, respondents' complaint is based upon the charge that tolls collected by petitioner do not comply with the statutory formula, not that they are unreasonable. As we have shown (*supra*, pp. 121–123, the statutory rate contended for by respondents is far below the figure which petitioner could charge as a reasonable rate. Respondents thus seek to obtain a statutory benefit, not simply a "reasonable" rate. In these circumstances they may not escape the terms of the statute. *Z. & F. Assets Corp.* v. *Hall*, 311 U. S. 470, 486. In particular, they cannot circumvent, under the guise of a damage suit, the provisions of Section 411 pursuant to which the toll rates continue in effect until changed by the President as provided in that section, and require that changes in toll rates be subject to, and take effect upon the approval of, the President whose action in such matters is final and conclusive. *Supra*, pp. 3–4, 16, 61–70.

What respondents actually seek to obtain is a judicial, retrospective, change of the rates in spite of the statutory command that only the President may alter them, and even he only prospectively. The President plainly is an indispensable party to any attempt to interfere with his exclusive statutory right to change the Canal tolls. Since he is not subject to

the jurisdiction of the courts (*Mississippi* v. *Johnson*, 4 Wall. 475), the complaint must be dismissed for nonjoinder of an indispensable party over whom jurisdiction cannot be obtained.[75] *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371, 375; *Minnesota* v. *United States*, 305 U. S. 382; *Louisiana* v. *Garfield*, 211 U. S. 70; see also Moore, *Federal Practice* (2d Ed.), Vol. 3, Section 19.15.

Moreover, where the regulation of a business has been entrusted to an administrative agency, the jurisdiction of the courts is limited to the correction of errors of law. When the court determines that such an error has been committed its functions end, and the matter should be remanded to the agency for further consideration. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141–146; *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 20–21; *Associated Industries* v. *Ickes*, 134 F. 2d 694, 700, fn. 5 (C. A. 2), vacated as moot, 320 U. S. 707; *Commissioner of Internal Revenue* v. *National Lead Co.*, 230 F. 2d 161, 165 (C. A. 2), affirmed on other grounds, 352 U. S. 313.

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[75] Prayer No. 6 of the complaint (R. 9) asks that the court impress a trust upon the alleged excess tolls. To the extent that respondents seek to follow the trust res into the United States Treasury, especially with respect to the $15,000,000 paid in dividends (*supra*, p. 122, fn. 51), the suit is "essentially one designed to reach money which the federal government owns. In these circumstances the United States is an indispensable party, *Minnesota* v. *United States*, 305 U. S. 382, 385 * * *". *Mine Safety Appliances Co.* v. *Forrestal*, 326 U. S. 371, 375; *Kennecott Copper Corp.* v. *State Tax Commission*, 327 U. S. 573, 577; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752, 755.

Accordingly, where an administrative procedure has been established for the determination of rates, rate-making ceases to be a function of the courts—assuming they ever had this quasi-legislative power—and may not be attempted either directly or indirectly. *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165, 177; cf. *Central Kentucky, etc., Co.* v. *Railroad Commission of Kentucky*, 290 U. S. 264, 271; *Connett* v. *City of Jerseyville*, 110 F. 2d 1015, 1018 (C. A. 7).

The computation of damages for allegedly excessive rates collected in the past would require the determination by the court of the rates which should have been in effect in the past. Such a calculation is like a retroactive rate determination, and it has long been recognized that, where an administrative agency has been entrusted with the determination of rates, the courts cannot in reparation proceedings independently determine what the proper rate should have been.[79] Even where, as under the Interstate Commerce Act, the courts and the regulatory commission have concurrent jurisdiction to grant reparations, the courts lack authority to maintain such proceedings to the extent that they are predicated upon the unreasonableness of the rate. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 437; *United States* v. *Western Pac. R. Co.*, 352

[79] Cf. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 446–447, indicating that the enactment of a regulatory statute abolishes the common-law action for reparations to the extent that it is inconsistent with the regulatory plan. See *supra*, p. 123.

U. S. 59, 62–70. In this case, therefore, the courts have no jurisdiction to determine the damages caused by the alleged overcharge.

Reference to the administrative agency for a determination of what the proper rate would have been would be of no avail, because the statutory plan does not provide for reparations. Section 411 directs expressly that the toll rate remains in effect until changed by the President (cf. p. 140). This circumstance that reference to the agency would be fruitless, however, does not vest in the courts the power to award reparations themselves. Confronted with the same problem in a case arising under the Federal Power Act, this Court held in *Montana-Dakota Co.* v. *Public Service Commission*, 341 U. S. 246, 253–255, that it could neither grant reparations itself, nor refer the matter to the Federal Power Commission. The Court stated:

> Under such circumstances, we conclude that, since the case involves only issues which a federal court cannot decide and can only refer to a body which also would have no independent jurisdiction to decide, it must decline the case forthrightly rather than resort to such improvisation [341 U. S. at 255].

In reaching this conclusion, the court was influenced by the circumstance, also present here, that the award of reparations to anyone except the ultimate consumer may result in a windfall where the excessive charges have already been passed on to the user's customers, and there is no appropriate mechanism for passing on the recovery (341 U. S. at 254). Since respond-

ents are carriers whose published tariffs necessarily reflected the Canal tolls collected, they presumably have recouped themselves, and there is no need to award a second recovery to them.[80]

B. Assuming, however, that the courts would have jurisdiction to award reparations, the determination of the damages allegedly suffered by respondents involves the determination of the toll rates which (a) petitioner should have computed under the toll formula and (b) the President would have approved. This computation involves elements which are completely outside the judicial domain.

As we have pointed out in detail (*supra*, pp. 80–81), the statutory toll formula[81] contains a number of discretionary elements such as "as nearly as practicable"; an "appropriate share", "substantial weight"; and ex-

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[80] Congress seems to be fully aware of this consideration: cf. the discussion of this law suit in *Changes in the Administration of the Panama Canal Company*, Hearings before the Subcommittee on Panama Canal of the Committee on Merchant Marine and Fisheries, House of Representatives, 84th Cong., 1st Sess., on H. R. 6917, etc., December 5, 1955, pp. 21–22.

[81] "SECTION 412 (b). Tolls shall be prescribed at a rate or rates calculated to cover, as *nearly as practicable*, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, *including, interest and depreciation*, and an *appropriate* share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such *appropriate* share, *substantial weight* shall be given to the *ratio* of the *estimated* gross revenues from tolls to the *estimated* total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government". (Emphasis added.)

tremely technical accounting problems such as "the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold," etc. The court would also have to determine the time when petitioner should have put the new rates into effect. The court below suggested that this should have been done when the petitioner's valuation process had been approved by the Bureau of the Budget [82] (R. 249). Actually, this approval was obtained only on September 9, 1957, *i. e.*, after the Court of Appeals had handed down its decision. See Appendix, *infra*, pp. 180–181.

A judicial computation of tolls complying "as nearly as possible" with the statutory formula would not represent the proper measure of damages. The tolls have to be approved by the President, and he has to take into account matters of national transportation policy, foreign relations, local and world wide trade, and national defense. *Supra*, pp. 65–70. As we have indicated (*supra pp.* 68–70), the drastic reduction of the Canal tolls by 25%, contended for by respondents, might have such serious effects upon foreign relations, national transportation, as well as local and world commerce, that the President would not give his approval.

In computing respondents' damages, the courts thus would have to consider problems which in their very

[82] Canal Zone Code, Title 2, Section 246 (b), *infra*, pp. 149–150. The Comptroller General's Report for 1954 points out that it was impossible to evaluate petitioner's financial condition with any degree of certainty while this question remained undetermined, pp. 1–2 (R. 41–42).

nature are outside the realm of judicial cognizance. Apart from matters which are customarily assigned exclusively to the discretion of expert administrative bodies, they involve issues "wholly confided by our Constitution to the political departments of the government, Executive and Legislative. * * * They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility * * *". *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103, 111.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment below should be reversed with costs to the extent that it reversed the judgment of the District Court, and that otherwise it be affirmed with costs.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
PAUL A. SWEENEY,
HERMAN MARCUSE,
Attorneys.

FEBRUARY 1958.

APPENDIX

I

1. The Act of June 29, 1948, 62 Stat. 1075, To Amend the Canal Zone Code for the Purpose of Incorporating the Panama Railroad Company, provides:

DECLARATION OF POLICY

SECTION 1. It is the policy of this Act, incorporating the Panama Railroad Company pursuant to section 304 (b) of the Government Corporation Control Act, approved December 6, 1945, for the purpose of conducting business activities incident to the care, maintenance, sanitation, operation, improvement, government, and protection of the Panama Canal and Canal Zone; to preserve the authority vested in the President by the Panama Canal Act of August 24, 1912; to govern and operate the Panama Canal and govern the Canal Zone, or cause them to be governed and operated, through a Governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the care, maintenance, sanitation, operation, government, and protection of the Canal and Canal Zone. Also, it is the policy of this Act that the operations in the Canal Zone shall continue to be coordinated, through the President, in order that the responsibility for and authority over this important utility shall not be divided.

REINCORPORATION OF THE PANAMA RAILROAD COMPANY

SEC. 2. Chapter 12 of title 2 of the Canal Zone Code, approved June 19, 1934 (48 Stat.

1122), is amended by adding at the end of said chapter a new article numbered 3, embracing new sections 245 to 256 of said title 2, and reading as follows;

"ARTICLE 3—PANAMA RAILROAD COMPANY ACT

"245. CREATION, PURPOSE, OFFICES, AND RESIDENCE OF PANAMA RAILROAD COMPANY.—For the purpose of conducting business operations incident to the care, maintenance, sanitation, operation, improvement, government, and protection of the Panama Canal and the Canal Zone, there is hereby created, as an agency and instrumentality of the United States, and as an adjunct of the Panama Canal, a body corporate to be known as the Panama Railroad Company, hereinafter referred to as the 'corporation'. The principal offices of the corporation shall be in the city of New York, New York, and in the Canal Zone, but the corporation may establish agencies or branch offices in such other place or places as it may deem necessary or appropriate in the conduct of its business. Within the meaning of the laws of the United States relating to venue in civil actions, the corporation shall be deemed to be an inhabitant and resident both of the southern judicial district of New York and of the Canal Zone.

"246. INVESTMENT OF THE UNITED STATES.—(a) As of the beginning of business July 1, 1948, the corporation shall issue to the United States, and deliver to the Secretary of the Treasury, a receipt for $1 acknowledging the transfer to the corporation, under the provisions of section 251 of this title, of the net assets of the Panama Railroad Company, hereinafter referred to as the 'New York company', a corporation created by an act of the Legislature of the State of New York passed on April 7, 1849, as amended by an act of that legislature passed on April 12, 1855, and which is wholly

owned by the United States, and such receipt shall be evidence of the ownership of the corporation by the United States of America. In its capacity as owner of the corporation, the United States shall be represented by the President of the United States or such officer of the United States as may be designated by him, hereinafter referred to as the 'stockholder'.

"(b) The amount of the receipt (referred to in paragraph (a) above) shall be increased by subsequent additional direct investments of the United States, in excess of repayments to the Treasury and extraordinary expenditures and losses applicable as offsets to such investments under the provisions of paragraph (d) of this section, due to (1) funds advanced to the corporation from the Treasury within such appropriations by the Congress as may from time to time be made to meet increased capital needs, and (2) transfers to the corporation from other Government agencies (or, conversely, decreased by transfers from the corporation to other Government agencies), pursuant to applicable provisions of law, of business enterprises, facilities, appurtenances, and other assets, less liabilities assumed in connection with such transfers. Transfers of properties and other assets from or to other Government agencies under clause (2) above shall be at such appropriate amount or amounts as shall be agreed upon between the corporation and the agencies concerned and approved by the Director of the Bureau of the Budget, and in the determination thereof due consideration shall be given to the cost and probable earning power of the transferred assets, or usable value to the transferee if clearly less than cost, and adequate provisions made for depreciation of properties and equipment, obsolete or otherwise unusable inventories, and other reasonably determinable shrinkages in values, and, insofar as practicable, there shall

be excluded from such amount any portion of the value of the transferred property which is properly allocable to national defense. The board of directors shall certify to the Secretary of the Treasury the amount of each such transfer, the amount of any accumulated repayments to the Treasury or extraordinary expenditures or losses applicable as offsets to the amount of such transfer under the provisions of paragraph (d) of this section, and the effective date of the transfer.

"(c) In order to reimburse the Treasury, as nearly as possible, for the interest cost of the funds or other assets directly invested in the corporation, the corporation shall pay interest to the Treasury, at least annually, on the net direct investment of the Government in the corporation, as defined in paragraphs (a) and (b) of this section, and shown by the receipt described therein, at a rate or rates determined by the Secretary of the Treasury as required to reimburse the Treasury for its cost.

"(d) The corporation shall account for its surplus as follows: (1) The total net income from operations from and after 1904 (when the Government acquired control of the New York company), plus the undistributed net income prior to 1904, less (2) payments to the Treasury as dividends from and after 1904, not applied as offsets to direct capital contributions, as described below, and less (3) extraordinary expenditures or losses incurred through directives based on national policy and not related to the operations of the corporation, not reimbursed through specific appropriations by the Congress, and not applied as offsets to direct capital contributions as described below. The corporation shall not be required to pay interest to the Treasury on any part of its surplus, as above defined. Repayments to the Treasury as dividends shall be applicable as offsets against directly contributed capital, past

or future, in determining the base for the interest payments required under paragraph (c) of this section. Extraordinary expenditures and losses (as defined in clause 3 above), to the extent not reimbursed through specific appropriations, shall be considered as repayments to the Treasury analogous to dividends and similarly applicable as offsets against directly contributed capital.

"247. BOARD OF DIRECTORS.—The management of the corporation shall be vested in a board of directors consisting of not less than nine nor more than thirteen persons who shall be appointed by and hold office at the pleasure of the stockholder, or if he so elects, consisting of the stockholder and eight to twelve other persons: *Provided,* That the Governor of the Panama Canal shall be a director and president of the corporation. Before entering upon his duties, each of the directors so appointed shall take an oath faithfully to discharge the duties of his office. The directors shall receive no salary for their services on the board, but under regulations and in amounts prescribed by the board of directors, with the approval of the stockholder, may be paid by the corporation a reasonable per diem allowance in lieu of subsistence expenses in connection with attendance at meetings of the board or in connection with the time spent on special service of the corporation, and their traveling expenses to and from meetings or when upon such special service, without regard to the Subsistence Expense Act of 1926, as amended, or the Standardized Government Travel Regulations. Nothing contained in this article or in any other Act shall be construed to prevent the appointment and service, as a director, officer, or employee of the corporation, of any officer or employee of the United States. The directors, of whom a majority shall constitute a

quorum for the transaction of business, shall meet for organization purposes when and where called by the stockholder, and for subsequent meetings as provided by the bylaws.

"248. GENERAL POWERS OF CORPORATION.—The corporation shall have and may exercise the following general powers, in addition to those elsewhere conferred in this article:

"(a) Shall have perpetual succession in its corporate name, unless dissolved by Act of Congress.

"(b) May adopt, alter, and use a corporate seal, which shall be judicially noticed.

"(c) May adopt, amend, and repeal bylaws governing the conduct of its general business, and the performance of the powers and duties granted to or imposed upon it by law.

"(d) May sue and be sued in its corporate name.

"(e) May appoint such officers, agents, attorneys, and employees as may be necessary for the conduct of the business of the corporation, define their authority and duties, fix their compensation, delegate to them such of the powers of the corporation as may be necessary, require that such of them as it may designate be bonded, and fix the penalties and pay the premiums of such bonds. Persons employed by the corporation whose compensation is paid on any basis other than a per annum basis shall not be included in making computations pursuant to the provisions of section 607 of the Federal Employees Pay Act of 1945.

"(f) May enter into contracts, leases, agreements, or other transactions.

"(g) Shall have, in the payment of debts out of bankrupt estates, the priority of the United States.

"(h) May determine the character of and necessity for its obligations and expenditures and the manner in which they shall be incurred, allowed, and paid, and may incur, allow, and

pay the same, subject to pertinent provisions of law generally applicable to Government corporations.

"(i) May purchase, lease, or otherwise acquire, and hold, own, maintain, work, develop, sell, lease, exchange, convey, mortgage, or otherwise dispose of, and deal in, lands, leaseholds, and any interest, estate, or rights in real property, and any personal or mixed property, and any franchises, concessions, rights, licenses, or privileges necessary or appropriate for any of the purposes expressed in this article.

"249. SPECIFIC POWERS OF CORPORATION.—Subject to the provisions of the Government Corporation Control Act, the corporation shall have and may exercise the following specific powers, in addition to those elsewhere conferred in this article:

"(a) May construct, maintain, and operate a railroad across the Isthmus of Panama.

"(b) May construct or acquire vessels, and operate the same for transportation of passengers or freight and for other purposes.

"(c) May construct or acquire, establish, maintain, and operate docks, wharves, piers, harbor terminal facilities, shops, yards, marine railways, salvage and towing facilities, fuel-handling facilities, motor-transportation facilities, power systems, water systems, a telephone system, construction facilities, living quarters and other buildings, warehouses, storehouses, hotels, a printing plant, commissaries and manufacturing, processing or service facilities in connection therewith, laundries, dairy facilities, restaurants, amusement and recreational facilities, and other business enterprises, facilities, and appurtenances necessary or appropriate for the accomplishment of the purposes of this article.

"(d) May make or furnish sales, services, equipment, supplies, and materials, as contemplated by this article, to vessels, to agencies

of the Government of the United States, to employees of the Government of the United States, and to any other governments, agencies, persons, corporations, or associations eligible to make or receive such purchases, services, supplies, or materials under the laws prevailing at the time and the policies heretofore or hereafter adopted consistently with such laws.

"(e) May use the United States mails in the same manner and under the same conditions as the executive departments of the Federal Government.

"(f) May take such actions as may be necessary or appropriate to carry out the powers in this article or hereafter specifically conferred upon it: *Provided*, That the corporation shall undertake no new types of activities not included in the annual budget program prescribed by section 102 of the Government Corporation Control Act (except those which may be transferred to it under the provisions of section 246 (b) of this title): *And provided further*, That in the event an emergency is declared to exist by the board of directors during a period when the Congress is not in session (or by the Governor of the Panama Canal, acting in his capacity as president of the corporation, with the concurrence of as many of the directors as may be consulted without loss of time unreasonable in the circumstances), recommended appropriate action within the scope of this article may be undertaken. A report on such emergency activity shall be presented promptly to the Congress, when it reconvenes, for its approval and such action as it may deem necessary or desirable with respect to reimbursement through supplemental appropriation of funds to cover costs or losses arising from such emergency.

"250. SUBJECTION OF CORPORATION TO LAWS APPLICABLE TO NEW YORK COMPANY.—The cor-

poration shall, so far as consistent with the terms of this article, be deemed subject to all provisions in treaties and in Acts of the Congress of the United States, now in force, which relate or apply to the New York company; and shall have all the rights, privileges, and exemptions, and be subject to all the obligations, liabilities, and responsibilities applicable to the New York company under or by virtue of such provisions.

"251. TAKING OVER OF ASSETS AND LIABILITIES OF; AND DISSOLUTION OF, NEW YORK COMPANY; RELEASE OF UNITED STATES TREATY RIGHTS IN ASSETS.—The corporation is authorized and directed to take over the assets and assume the liabilities of the New York company as of July 1, 1948. To accomplish the transfer of such assets to, and the assumption of such liabilities by, the corporation, and to accomplish the dissolution of the New York company, the two corporations are authorized and directed to take, under the supervision of the stockholder, whatever action shall be determined to be appropriate and necessary, whether by agreement, transfer, merger, consolidation, dissolution, or otherwise. Effective upon the transfer of such assets and the assumption of such liabilities, there are hereby released and transferred to the corporation all the right, title, and interest, in and to such assets, which the United States now has or may hereafter acquire by virtue of the convention of November 18, 1903, between the United States and the Republic of Panama; and, specifically, there are hereby released to the corporation any and all reversionary rights of the United States in the lands of the corporation located in the cities of Panama and Colon, Republic of Panama.

"252. REIMBURSEMENT OF OTHER AGENCIES.—The corporation shall reimburse the Civil Service and Canal Zone Retirement and Disability Funds for Government contributions to the re-

tirement fund applicable to the corporation's employees, and the Employees' Compensation Fund, Bureau of Employees' Compensation, Federal Security Agency, for the benefit payments made to the corporation's employees, and shall also reimburse other Government agencies for any payments of a similar nature made on its behalf.

"253. PAYMENT OF EXCESS FUNDS INTO THE TREASURY.—The board of directors shall have the power and duty to appraise, at least annually, its necessary working capital requirements, together with reasonable foreseeable requirements for authorized plant replacement and expansion, and to pay into the Treasury as dividends the amount of funds in excess thereof. Such dividends shall be treated by the Treasury as miscellaneous receipts, but shall be treated on the books of the corporation as applicable to reduction of past or future direct Government capital contributions (as provided in section 246 (d) of this title) in determining the base for interest payments required under section 246 (c).

"254. EMERGENCY FUND.—The corporation may borrow from a fund to be established and maintained in the Treasury, for any authorized purposes of the corporation, but for limited periods only, sums of money not to exceed a total of $10,000,000 outstanding at any one time. The fund shall be established by the deposit by the New York company with the Treasury on or before June 30, 1948, of the sum of $10,000,000 from the invested depreciation reserve funds presently maintained by the New York company, which amount, less any amounts borrowed therefrom by the corporation from time to time, shall be maintained by the Treasury as a separate fund. Amounts borrowed from said fund shall be paid over to the coroporation by the Secretary of the Treasury, and repayments thereof shall be redeposited in said fund and

will be available for subsequent loans. Loans to the corporation from this fund shall not bear interest.

"255. AMENDMENT OR REPEAL.—The right to alter, amend, or repeal this article is expressly reserved.

"256. SEPARABILITY CLAUSE.—If any provision of this article, or the application of such provision to any person or circumstances, is held invalid, the remainder of this article and the application of such provision to other persons and circumstances shall not be affected thereby."

2. Section 2 of the Act of August 12, 1949, amending the Canal Zone Code, Title 2, Sections 51 and 52, 63 Stat. 601, provides in pertinent part:

SEC. 51. AUTHORIZATION FOR ESTABLISHMENT AND OPERATION OF VARIOUS FACILITIES.—(a) In connection with the operation, maintenance, sanitation, and civil government of the Panama Canal and Canal Zone, the President is authorized to establish, maintain, and operate, through the Panama Railroad Company, or otherwise, docks, wharves, piers, drydocks, shops, yards, marine railways, salvage and towing facilities, dredging facilities, construction facilities, fuel-handling facilities, motor-transportation facilities, civil air terminals, power systems, water and sewer systems, warehouses, storehouses, hotels, a printing plant, living quarters and other buildings, and any other necessary facilities and appurtenances, for the purpose of providing, at reasonable prices, fuel, electric power, water, equipment, supplies and materials generally, repairs, labor transportation, quarters, space in buildings, wharf and like services, hotel and restaurant services, and services generally, including recreational services, and for the purpose of assembling, assorting, storing, repairing, and selling scrap and

other byproducts of manufacturing and shop operations, and materials, supplies, and equipment purchased or acquired for the construction, improvement, operation, maintenance, sanitation, or civil government of the Panama Canal or Canal Zone and which are obsolete, unserviceable, or no longer needed. The sales, services, equipment, supplies, and materials hereinbefore referred to may be made or furnished to vessels, to agencies of the Government of the United States, to the Panama Railroad Company, to employees of the Government of the United States or of the Panama Railroad Company, and to any other governments, agencies, persons, corporations, companies, or associations eligible to make or receive such purchases, services, supplies, or materials under the laws prevailing at the time and the policies heretofore or hereafter adopted consistently with such laws.

(b) In the event the President has heretofore elected, or shall at any time hereafter elect, to maintain and operate through the Panama Railroad Company any of the facilities and appurtenances referred to in this section or section 52 of this title, theretofore maintained and operated by the Panama Canal, the President is authorized to transfer to the Panama Railroad Company all or as much as may be determined to be necessary of the personnel, property, records, related assets, contracts, obligations, and liabilities of or appertaining to the said facility and its appurtenances, and such transfer shall be deemed to have been accepted and assumed by the Panama Railroad Company without the necessity of any act or acts on the part of the said corporation except as otherwise stipulated in provisions of law applicable to the said corporation.

SEC. 52. ORGANIZATION AND CONDUCT OF ANY SUCH FACILITIES BY PANAMA CANAL AS "BUSINESS OPERATIONS".—The President may cause

any or all of the facilities and appurtenances referred to in paragraph (a) or (b) of section 51 of this title to be organized and conducted by the Panama Canal as "business operations", and in such case the aggregate net profit if any accruing from the conduct of such business operations shall annually be covered into the Treasury of the United States.

3. The Act of September 26, 1950, 64 Stat. 1038, To Authorize and Provide for the Maintenance and Operation of the Panama Canal by the Present Corporate Adjunct of the Panama Canal, as Renamed, to Reconstitute the Agency Charged With the Civil Government of the Canal Zone, and for other purposes, provides:

Section 5 of title 2 of the Canal Zone Code, approved June 19, 1934 (48 Stat. 1122), is amended to read as follows:

"5. ESTABLISHMENT, ADMINISTRATION, AND FUNCTIONS OF CANAL ZONE GOVERNMENT.—The independent agency of the United States heretofore known as the Panama Canal shall hereafter—

"(1) be known as the Canal Zone Government;

"(2) be administered, under the supervision of the President or such officer of the United States as may be designated by him, by a Governor of the Canal Zone; and

"(3) be charged, except as otherwise provided by law, with the performance of the various duties connected with the civil government, including health, sanitation and protection, of the Canal Zone.

"CROSS-REFERENCE

"Appointment of other necessary persons, see section 84 of this title, as amended."

SEC. 2. (a) Except as otherwise provided in, or where inconsistent with, the provisions of this Act—

(1) the terms "the Panama Canal", "the Canal", and "the Canal authorities", wherever appearing in the statutes of the United States and having reference, prospectively, to the agency heretofore known by those names, are amended to read "the Canal Zone Government"; and

(2) the term "the Panama Railroad Company", wherever appearing in the statutes of the United States and having reference, prospectively, to the corporation heretofore known by that name, is amended to read "the Panama Canal Company".

(b) Except as otherwise provided in this Act, the title "the Governor of the Panama Canal", wherever appearing in the statutes of the United States, is amended to read "the Governor of the Canal Zone".

(c) Sections 982, 987, and 1024 of title 4, and section 833 of title 5, of the Canal Zone Code, are amended by deleting the term "the Panama Canal", appearing in each of said sections, and inserting in lieu thereof the term "the Panama Canal Company".

(d) Section 836 of title 5 of the Canal Zone Code is amended by deleting the term "the Government of the Canal Zone", which appears in paragraph b of said section and inserting in lieu thereof the term "the Panama Canal Company".

(e) The headline and introductory clause of section 7 of title 2 of the Canal Zone Code are amended to read as follows:

"7. CONTROL AND JURISDICTION OF GOVERNOR OVER CANAL ZONE.—The Governor of the Canal Zone shall: * * *."

SEC. 3. Section 10 of title 2 of the Canal Zone Code, as amended by section 1 of the Act of June 13, 1940 (ch. 358, 54 Stat. 387), is further amended to read as follows:

"10. INJURIES TO VESSELS, CARGO, CREW, OR PASSENGERS, OCCASIONED BY OPERATION OF CANAL—(a) INJURIES IN LOCKS OF CANAL.—The Panama Canal Company shall promptly adjust and pay damages for injuries to vessels, or to the cargo, crew, or passengers of vessels, which may arise by reason of the passage of such vessels through the locks of the Panama Canal under the control of officers or employees of the said corporation: *Provided, however,* That no such damages shall be paid in any case where the injury was proximately caused by the negligence or fault of the vessel, master, crew, or passengers: *Provided further,* That in any case wherein the negligence or fault of the vessel, master, crew, or passengers proximately contributed to the injury, the award of damages shall be diminished in proportion to the negligence or fault attributable to the said vessel, master, crew, or passengers: *And provided further,* That damages shall not be allowed and paid for injuries to any protrusion beyond the side of a vessel, whether such protrusion is permanent or temporary in character. A vessel shall be considered to be passing through the locks of the Canal, under the control of officers or employees of the corporation, from the time the first towing line is made fast on board before entrance into the locks and until the towing lines are cast off upon, or immediately prior to, departure from the lock chamber.

"(b) INJURIES OTHER THAN IN LOCKS.—The Panama Canal Company shall promptly adjust and pay damages for injuries to vessels, or to the cargo, crew, or passengers of vessels which may arise by reason of the presence of such vessels in the waters of the Canal Zone, other than the locks, when the injury was proximately caused by negligence or fault on the part of any officer or employee of the corporation acting within the scope of his employment and in the line of his duties in connection with

the operation of the canal: *Provided, however,* That in any case wherein the negligence or fault of the vessel, master, crew, or passengers proximately contributed to the injury, the award of damages shall be diminished in proportion to the negligence or fault attributable to the said vessel, master, crew, or passengers: *And provided further,* That in the case of any vessel which is required by or pursuant to regulations prescribed under section 9 of this title, as amended, to have a Panama Canal pilot on duty aboard, no damages shall be adjusted and paid for injuries to any vessel, or to the cargo, crew, or passengers of any such vessel, incurred while the vessel was under way and in motion, unless at the time such injuries were incurred the navigation or movement of the vessel was under the control of a Panama Canal pilot.

"(*c*) MEASURE OF DAMAGES GENERALLY.—In determining the amount of the award of damages for injuries to a vessel for which the Panama Canal Company is found or determined to be liable, there may be included (1) actual or estimated cost of repairs; (2) charter hire actually lost by the owners, or charter hire actually paid, depending upon the terms of the charter party, for the time the vessel is undergoing repairs; (3) maintenance of the vessel and wages of the crew, if such are found to be actual additional expenses or losses incurred outside of the charter hire; (4) other expenses which are definitely and accurately shown to have been incurred necessarily and by reason of the accident or injuries: *Provided, however,* That there shall not be allowed agent's fees or commissions or other incidental expenses of similar character, or any items which are indefinite, indeterminable, speculative, or conjectural. The corporation shall be furnished such

vouchers, receipts, or other evidence as may be necessary in support of any item of a claim. If a vessel is not operated under charter but by the owner directly, evidence shall be secured if available as to the sum for which vessels of the same size and class can be chartered in the market. If such charter value cannot be determined, the value of the use of such vessel to its owners in the business in which it was engaged at the time of the injuries shall be used as a basis for estimating the damages for the vessel's detention; and the books of the owners showing the vessel's earnings about the time of the accident or injuries shall be considered as evidence of probable earnings during the time of detention. If the books are unavailable, such other evidence shall be furnished as may be necessary.

"(d) DELAYS FOR WHICH NO RESPONSIBILITY ASSUMED.—The Panama Canal Company shall not be responsible, nor consider any claim, for demurrage or delays occasioned by landslides or other natural causes, by necessary construction or maintenance work on Canal locks, terminals, or equipment, by obstructions arising from accidents, by time necessary for admeasurement, by congestion of traffic, or by any other cause except as specially set forth in this section.

"(e) SETTLEMENT OF CLAIMS.—The amounts of the respective awards of damages under this section may be adjusted, fixed, and determined by the corporation by mutual agreement, compromise, or otherwise; and acceptance by any claimant of the amount awarded to him shall be deemed to be in full settlement of such claims.

"(f) ACTIONS ON CLAIMS.—Any claimant for damages under this section who considers himself aggrieved by the findings, determination,

or award of the Panama Canal Company in reference to his claim may bring an action on such claim against the said corporation in the United States District Court for the District of the Canal Zone; and in any such action the provisions of this section relative to the determination, adjustment, and payment of such claims, and the provisions of the regulations established under section 9 of this title, as amended, relative to navigation of Canal Zone waters and to transiting of the Panama Canal, shall be applicable. No action for damages which is cognizable under this section shall lie against the said corporation otherwise, or in

any other court, than as provided in this paragraph, or shall lie against any officer or employee of the corporation: *Provided, however*, That nothing in this paragraph shall be construed to prevent or prohibit actions against officers or employees of the said corporation for damages for injuries resulting from acts of such officers or employees outside the scope of their employment or not in the line of their duties or from acts of such officers or employees committed or performed with intent to injure the person or property of another. Actions under this paragraph shall be tried by the court without a jury.

"(g) INVESTIGATION BEFORE VESSEL'S DEPARTURE.—Notwithstanding any other provision of law, no claim shall be considered under this section, nor shall any action for damages lie thereon, unless, prior to the departure from Canal Zone waters of the vessel involved, the investigation by the competent authorities of the accident or injury giving rise to such claim shall have been completed, and the basis for the claim shall have been laid before the corporation."

SEC. 4. Section 82 of title 2 of the Canal Zone Code is amended to read as follows:

"82. COMPENSATION OF PERSONS IN MILITARY, NAVAL, OR PUBLIC HEALTH SERVICE.—(a) If any of the persons appointed or employed as provided in section 6, or section 81, as amended, of this title are in the military, naval, or Public Health Service of the United States, the amount of the official salary paid to any such person shall be deducted from the amount of salary or compensation provided by or which shall be fixed under the terms of those sections, but this section shall not be construed as requiring the deduction from the amount of such salary or compensation of—

"(1) the retired pay or allowance of any retired warrant officer or enlisted man of the

Army, Navy, Air Force, Marine Corps, or Coast Guard; or

"(2) the training pay, retainer pay or allowances of any warrant officer or enlisted man of the Reserve forces of the Army, Navy, Air Force, Marine Corps, or Coast Guard.

"(b) The Canal Zone Government shall annually pay to each of the aforesaid services an amount sufficient to reimburse the said service for the official salary paid to any person in such service for the period of appointment or employment by the Canal Zone Government."

SEC. 5. The headline and first sentence of section 245 of title 2 of the Canal Zone Code, as added by the Act of June 29, 1948 (ch. 706, 62 Stat. 1075), are amended to read as follows:

"245. CREATION, PURPOSES, OFFICES, AND RESIDENCE OF PANAMA CANAL COMPANY.—For the purposes of maintaining and operating the Panama Canal and of conducting business operations incident to such maintenance and operation and incident to the civil government of the Canal Zone, there is hereby created, as an agency and instrumentality of the United States, a body corporate to be known as the Panama Canal Company, hereinafter referred to as the 'corporation'. * * *."

SEC. 6. Paragraph (c) of section 246 of title 2, Canal Zone Code, as added by the Act of June 29, 1948, is amended to read as follows:

"(c) In order to reimburse the Treasury, as nearly as possible, for the interest cost of the funds or other assets directly invested in the corporation, the corporation shall pay interest to the Treasury on the net direct investment of the Government in the corporation as defined in paragraphs (a) and (b) of this section, and shown by the receipt described therein, at a rate or rates determined by the Secretary of the Treasury as required to reimburse the Treasury for its cost. Payments of such interest charges shall be made annually to the

extent earned, and if not earned shall be made from subsequent earnings."

SEC. 7. Section 246 of title 2, Canal Zone Code, as added by the Act of June 29, 1948, is amended by adding at the end thereof a new paragraph lettered (e) and reading as follows:

"(e) The corporation is further obligated to pay into the Treasury as miscellaneous receipts amounts sufficient to reimburse the Treasury, as nearly as possible, (1) for the annuity payments under article XIV of the convention of November 18, 1903, between the United States of America and the Republic of Panama, as modified by article VII of the treaty of March 2, 1936, between the said Governments, and (2) for the net costs of operation of the agency known as the Canal Zone Government. The net costs of operation of the Canal Zone Government, which are deemed to form an integral part of the costs of operation of the Panama Canal enterprise as a whole, shall not include interest but shall include depreciation and the reimbursement of other Government agencies for expenditures made on behalf of the Canal Zone Government. The payments into the Treasury, referred to in this paragraph, shall be made annually to the extent earned, and if not earned shall be made from subsequent earnings unless the Congress shall otherwise direct."

SEC. 8. Subparagraph (e) of section 248 of title 2, Canal Zone Code, as added by the Act of June 29, 1948, is amended by adding at the end thereof a sentence reading as follows: "The provisions of section 82 of this title, as amended, shall apply to the corporation and to its officers and employees."

SEC. 9. Section 249 of title 2 of the Canal Zone Code, as added by the Act of June 29, 1948, is amended by relettering subparagraphs (a) to (f) thereof as subparagraphs (b) to (g), respectively, and by inserting after the intro-

ductory clause of said section a new subparagraph reading as follows:

"(a) May maintain and operate the Panama Canal."

SEC. 10. Article 3 of chapter 12 of title 2, Canal Zone Code, as added by the Act of June 29, 1948, is amended by renumbering sections 255 and 256 of said title 2 as sections 257 and 258, respectively, and by adding, in said article 3, two new sections numbered 255 and 256 and reading as follows:

"255. APPROPRIATIONS TO COVER LOSSES.—Appropriations are hereby authorized for payment to the corporation of such amounts as may be shown in the annual budget program of the corporation as necessary to cover losses sustained in the conduct of its activities. Amounts appropriated to the corporation under authority of this section shall not be added to the amount of the receipt referred to in paragraphs (a) and (b) of section 246 of this title, and shall not require payment of interest under paragraph (c) of said section 246: *Provided, however,* That repayments by the corporation to the Treasury shall in no case be treated as dividends under sections 246 (d) and 253 of this title until all amounts appropriated to the corporation under authority of this section shall have been repaid to the Treasury."

"256. AUTHORIZATION FOR TRANSFER OF PANAMA CANAL TO CORPORATION.—The President is hereby authorized to transfer to the corporation the Panama Canal, together with the facilities and appurtenances related thereto, and any or all of the facilities and appurtenances heretofore maintained and operated by the Panama Canal under authority of section 51 of title 2 of the Canal Zone Code, as amended by section 2 of the Act of August 12, 1949 (ch. 422, 63 Stat. 601), and all or so much as he may determine to be necessary of the

personnel, property, records, related assets, contracts, obligations, and liabilities of or appertaining to the said Canal and the aforesaid facilities or appurtenances, and such transfer shall be deemed to have been accepted and assumed by the corporation without the necessity of any act or acts on the part of the corporation except as otherwise stipulated in the provisions of section 246 of this title."

SEC. 11. Section 411 of title 2 of the Canal Zone Code is amended to read as follows:

"411. AUTHORITY TO PRESCRIBE MEASUREMENT RULES AND TOLLS.—The Panama Canal Company is authorized to prescribe and from time to time change (1) the rules for the measurement of vessels for the Panama Canal, and (2), subject to the provisions of the section next following, the tolls that shall be levied for the use of the Panama Canal: *Provided, however,* That the rules of measurement, and the rates of tolls, prevailing on the effective date of this amended section shall continue in effect until changed as provided in this section: *Provided further,* That the said corporation shall give six months' notice, by publication in the Federal Register, of any and all proposed changes in basic rules of measurement and of any and all proposed changes in rates of tolls, during which period a public hearing shall be conducted: *And provided further,* That changes in basic rules of measurement and changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter shall be final and conclusive."

SEC. 12. Section 412 of title 2 of the Canal Zone Code, as amended by the Act of August 24, 1937 (ch. 752, 50 Stat. 750), is amended to read as follows:

"412. BASES OF TOLLS.—(a) Tolls on merchant vessels, army and navy transports, colliers, tankers, hospital ships, supply ships, and

yachts shall be based on net vessel-tons of one hundred cubic feet each of actual earning capacity determined in accordance with the rules for the measurement of vessels for the Panama Canal, and tolls on other floating craft shall be based on displacement tonnage. The rate of tolls on vessels in ballast without passengers or cargo may be less than the rate of tolls for vessels with passengers or cargo.

"(b) Tolls shall be prescribed at a rate or rates calculated to cover, as nearly as practicable, all costs of maintaining and operating the Panama Canal, together with the facilities and appurtenances related thereto, including interest and depreciation, and an appropriate share of the net costs of operation of the agency known as the Canal Zone Government. In the determination of such appropriate share, substantial weight shall be given to the ratio of the estimated gross revenues from tolls to the estimated total gross revenues of the said corporation exclusive of the cost of commodities resold, and exclusive of revenues arising from transactions within the said corporation or from transactions with the Canal Zone Government.

"(c) Vessels operated by the United States, including warships, naval tenders, colliers, tankers, transports, hospital ships, and other vessels owned or chartered by the United States for transporting troops or supplies, may in the discretion of the President of the United States be required to pay tolls. In the event, however, that such vessels are not required to pay tolls, the tolls thereon shall nevertheless be computed and the amounts thereof shall be treated as revenues of the Panama Canal Company for the purpose of prescribing the rates of tolls, and shall be offset against the obligations of the said corporation under paragraphs (c) and (e) of section 246 of this title, as amended.

"(d) The levy of tolls is subject to the provisions of section 1 of article III of the treaty between the United States of America and Great Britain concluded on November 18, 1901, of articles XVIII and XIX of the convention between the United States of America and the Republic of Panama concluded on November 18, 1903, and of article I of the treaty between the United States of America and the Republic of Colombia proclaimed on March 30, 1922.

"(e) Capital investment for interest purposes shall not include any interest during construction."

SEC. 13. The following statutes and parts of statutes are repealed:

(1) Canal Zone Code, title 2, sections 32 and 33;

(2) Canal Zone Code, title 2, sections 51 to 54, as amended by section 2 of the Act of August 12, 1949 (ch. 422, 63 Stat. 601);

(3) Canal Zone Code, title 2, section 414;

(4) The paragraph entitled "Housing of officers serving in the Canal Zone" of the Act of July 9, 1918 (ch. 143, 40 Stat. 855; 10 U. S. C., sec. 721);

(5) Subparagraph (g) of section 2680 of title 28, United States Code;

(6) Section 6 of the Act of August 1, 1914 (ch. 223, 38 Stat. 679; 31 U. S. C., sec. 621);

(7) Section 1 of the Act of June 29, 1948 (ch. 706, 62 Stat. 1075; 48 U. S. C., sec. 1361); and

(8) All statutes and parts of statutes inconsistent with this Act, to the extent of such inconsistency.

SEC. 14. Except for section 256 of title 2 of the Canal Zone Code, as added by section 10 of this Act, this Act shall take effect upon the effective date of the transfer to the corporation, pursuant to the provisions of said section 256, of the Panama Canal together with the facilities and appurtenances related thereto.

II

4. The Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, *et seq.*, provides in pertinent part:

SEC. 2 [5 U. S. C. 1001]. As used in this Act—

* * * * *

(c) *Rule and Rule Making.*—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

* * * * *

SEC. 4 [5 U. S. C. 1003]. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

* * * * *

(d) *Petitions.*—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

* * * * *

SEC. 10 [5 U. S. C. 1009]. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of Review.*—Any person suffering legal wrong because of any agency action, or

adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form and Venue of Action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) *Reviewable Acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) *Interim Relief.*—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from

or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) *Scope of Review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

III

100 CONG. REC. (DAILY ED.) A1995–1996*

STUDY OF PANAMA CANAL TOLLS

EXTENSION OF REMARKS OF HON. GLENN R. DAVIS, OF WISCONSIN, IN THE HOUSE OF REPRESENTATIVES, TUESDAY MARCH 16, 1954

Mr. DAVIS of Wisconsin. Mr. Speaker, under unanimous consent to extend my remarks in the RECORD, I would like to include the results of a recent study on tolls for the Panama Canal. This study was conducted under the supervision of the Panama Canal Company and submitted to the Congress by the Governor of the Canal Zone:

MARCH 5, 1954.

Hon. JOSEPH W. MARTIN, Jr.,
Speaker of the House.

MY DEAR MR. SPEAKER: The conference report on the civil functions appropriation bill, 1954 (H. Rept. No. 889, 83d Cong.) contained the following directive to the Panama Canal Company:

"The conferees also desire to point out the urgency of the completion of the current tolls study regarding the adequacy of tolls presently charged vessels using the canal. The conferees will expect this study to be completed and submitted to the Congress so as to be fully considered in the 2d session of the 83d Congress."

The establishment of tolls for the use of the Panama Canal is governed principally by sections 411 to 413 of title 2, Canal Zone Code, as amended by the act of September 26, 1950 (61 Stat. 1041).

*Not printed in the permanent edition of the Congressional Record.

Section 411 of title 2 vests in the Company authority to prescribe and from time to time change the tolls for the use of the canal, subject to the provisions of section 412 of title 2 (which prescribes bases of tolls), and subject to provisos that the Company shall give 6 months' notice, by publication in the Federal Register, of proposed changes in rates of tolls, during which a public hearing shall be conducted, and that changes in rates of tolls shall be subject to, and shall take effect upon, the approval of the President of the United States, whose action in such matter is made final and conclusive.

Under the statutes in question, the Company is obligated to maintain a continuous observation and evaluation of tolls rates, in relation to estimates of cost, traffic and revenues, from the standpoint of determining whether, in terms of long-range trends, the rates existing at a given time are proper and should be maintained or whether some adjustment is required. Proceedings to change the tolls are thus to be instituted by the Company, whenever the Company concludes that changes in the rates are indicated and necessary, and arrives at proposed specific new rates of tolls.

An initial study of the adequacy of tolls rates under the new legislation has now been completed by the Company. This study reveals that, largely as a result of the very high level of traffic using the canal in recent years without a corresponding increase in costs, the tolls rates that have been in effect since 1938 are still sufficient to cover all operating costs, including interest and depreciation, as required by the tolls statutes. This conclusion is based on the assumption that the Director of the Bureau of the Budget, who under the law must approve the valuation of the assets transferred to the Company from the agency formerly known as the Panama Canal, will concur generally in the valuations tentatively established by the Company

upon which the interest and depreciation requirements for the most part have been based.

In recent months, chiefly as the result of the cessation of hostilities in Korea, there has been some drop in traffic transiting the canal. The Company's study indicates that a further and more substantial decline in the volume of canal traffic during the next few years is to be expected primarily as the result of changing economic factors affecting world movements of petroleum and its products, iron ore, and coal. It is possible that by sometime during the fiscal year 1955 canal traffic will have declined to a point where revenues at existing rates will no longer be adequate to cover all charges. Should this condition materialize and should it appear reasonably certain that it will continue for an appreciable length of time, the Company will promptly take the steps available to it to increase the rates of tolls.

In computing the tolls requirements for purposes of this study the Company has made what it believes to be an adequate allowance for depreciation giving due consideration to the factors of obsolescence and potential inadequacy of the capital assets includable in the tolls base. Estimates of the service lives used for the principal classes of plant and equipment have been approved by independent engineering consultants. A depreciation rate of 1 percent per annum from date of service has been used for the investment in the channel, harbors, lock structures, dams, breakwaters and similar long-lived facilities. Including this accrual the annual depreciation requirements of the Company are presently approximately $9 million.

The tentative valuations used in the study result in a net interest-bearing investment of the Government in the Canal enterprise, as defined by law, of $274 million. At the rate of 2.342 percent currently established for repayment of interest costs as required by the Company's charter annual interest payments to the Treasury will amount to $6.4 million. It is expected that

this amount will increase somewhat in the future years as the result of the generally rising trend of long term interest rates.

No depreciation or return on the capital value of interest during the 1904–14 construction period has been included in the study because the legislative history of the present tolls statutes clearly indicates the intent of the Congress to exclude this item entirely from the tolls base. Likewise no provision has been made for amortization of lands and treaty rights because of lack of statutory authority, although these assets have been included in the investment for interest purposes.

Using the tentative plant valuations developed by the Company and recomputing the operating costs and expenses accordingly, the aggregate net income of the Company from all sources for the 4-year period from the reorganization to June 30, 1955, under present tolls rates is estimated to be approximately $9 million after providing for all charges currently authorized and required by law. As previously indicated however, it appears that a possible decline in volume of Canal traffic coupled with rising interest and wage rates may necessitate an increase in the tolls rates in the near future. Current indications are that such an increase may be necessary by July 1, 1955, in which case public announcement of the new rates would be made 6 months earlier or January 1, 1955, as required by law.

There is attached as background material a short historical summary of Panama Canal tolls rates and a copy of the present tolls statutes.

Sincerely yours,

J. S. SEYBOLD,
President.

SHORT HISTORY OF PANAMA CANAL TOLLS RATES

The Panama Canal was opened to commerce on August 15, 1914.

Proclamation No. 1225, issued by the President of the United States on November 13, 1912, prescribing the following rates of toll to be paid by vessels using the Panama Canal:

"(a) On merchant vessels carrying passengers or cargo $1.20 per net vessel ton—each 100 cubic feet—of actual earning capacity.

"(b) On vessels in ballast without passengers or cargo, 40 percent less than the rate of tolls for vessels with passengers or cargo.

"(c) Upon naval vessels, other than transports, colliers, hospital ships, and supply ships, 50 cents per displacement ton.

"(d) Upon Army and Navy transports, colliers, hospital ships, and supply ships $1.20 per net ton, the vessels to be measured by the same rules as are employed in determining the net tonnage of merchant vessels."

The toll rates prescribed by Proclamation No. 1225, were established pursuant to section 5 of the Panama Canal Act of August 24, 1912, which authorized tolls to be based upon gross or net registered tonnage, displacement tonnage, or otherwise, but provided that if the tolls were not based upon net registered tonnage they should not exceed the equivalent of $1.25 per net registered ton nor be less than the equivalent of $0.75 per net registered ton. This section was subsequently carried into the Canal Zone Code as section 412 of title 2.

In order to determine the amount of tolls payable under this legislation it was necessary to consider the net tonnage of the vessel under the United States rules as well as under the Panama Canal rules of measurement, creating what came to be known as the dual system of measurement. This permitted vessels by taking full advantage of the rules governing the com-

putation of registered tonnage to reduce the basis for their tolls assessment with the result that the Government was deprived of revenue which it would have otherwise received under the Panama Canal rules.

To meet this situation the President, acting under authority of the Congress, appointed a Special Committee on Panama Canal Tolls and Vessel Measurement Rules to make an independent study of the whole problem and recommend modifications of the rules of measurement and rates to be charged in order to provide a practical, just, and equitable system of measuring vessels and levying tolls.

The special committee, after an exhaustive study, submitted its report to the President, who transmitted it to Congress February 26, 1937, with a message approving the recommendations of the committee for the enactment of necessary remedial legislation, which would abolish the unsatisfactory dual system of measurement and establish a single system based on Panama Canal rules of measurement to which the limits fixed by Congress would be applied.

The recommendations of the special committee were adopted by the Congress in the act of August 24, 1937 (50 Stat. 750), providing that tolls should be based on the tonnage determined in accordance with rules of measurement prescribed by the President within maximum and minimum limitations, $1 and $0.75 per net vessel ton, respectively.

Pursuant to authority contained in the law, the President issued proclamation No. 2247 of August 25, 1937, establishing the following rates of toll for vessels using the Panama Canal:

"(a) On merchant vessels, yachts, Army and Navy transports, colliers, hospital ships, and supply ships, when carrying passengers or cargo, 90 cents per net vessel ton of 100 cubic feet each of actual earning capacity.

"(b) On vessels in ballast without passengers or cargo, 72 cents per net-vessel-ton.

"(c) On other floating craft, including warships, other than transports, colliers, hospital ships, and supply ships, 50 cents per ton of displacement."

New rules for measurement of vessels using the canal were prescribed by proclamation No. 2248, also issued on August 25, 1937, and effective March 1, 1938.

In 1948, on the recommendation of the Governor of the Panama Canal, the President issued proclamation No. 2775 of March 26, 1948, increasing tolls to the maximum statutory limit of $1 per ton, effective October 1, 1948. At congressional request the effective date of this proclamation was successively postponed by proclamations Nos. 2808, 2831, 2852, and 2875, to April 1, 1949, September 1, 1949; April 1, 1950; and April 1, 1951, respectively. In response to a request contained in House Report No. 1304, 81st Congress, the President on January 31, 1950, transmitted to the Congress a report and recommendations of the Bureau of the Budget with respect to the organization and operations of the Panama Canal and Panama Railroad Company (H. Doc. 460, 81st Cong.). That report recommended, among other things, adoption of a new basis for levying tolls.

The act of September 26, 1950 (61 Stat. 1041), reorganized the canal enterprise along the lines recommended by the Bureau of the Budget, and amended section 412 of title 2 of the Canal Zone Code prescribing the bases of tolls. The section, as amended, is set out in full in attachment B. Concurrently, with his approval of the act of September 26, 1950, the President issued proclamation 2903 of September 26, 1950, revoking proclamation No. 2775 of March 26, 1948. The new tolls legislation became effective July 1, 1951.

IV

APPROVAL, DATED SEPTEMBER 9, 1957, BY THE DIRECTOR OF THE BUDGET OF THE VALUATION OF THE PROPERTIES TRANSFERRED TO THE PANAMA CANAL COMPANY BY THE CANAL ZONE GOVERNMENT.

EXECUTIVE OFFICE OF THE PRESIDENT
BUREAU OF THE BUDGET
WASHINGTON 25, D. C.

SEPTEMBER 9, 1957.

MY DEAR GENERAL POTTER:

I have your letter of July 17, 1957, transmitting an agreement of the same date between the Panama Canal Company and the Canal Zone Government as to the valuation of certain properties transferred to the Company, effective July 1, 1950, under the provisions of Executive Order 10102, and effective July 1, 1951, under Executive Order 10263. The agreement also covers the valuation of certain miscellaneous items transferred to the Company which had no usable value to the Company at the time of the 1951 transfer but which were reactivated to use in the fiscal years 1956 and 1957. The properties transferred are described in the documents referred to in the agreement.

Section 246 (b) of Title 2 of the Canal Zone Code, as added by the Act of June 29, 1948 (62 Stat. 1076) requires that my approval be given to the amounts agreed upon between the two agencies, in accordance with the provisions of that section, as the amounts at which the properties should be transferred. Your letter requests approval of the amounts set forth in the agreement, as follows: $5,002,091.59 for assets transferred effective July 1, 1950; $396,861,673.99 for assets transferred effective July 1, 1951; and $11,348.14 applicable to fiscal year 1956 and $69,588.14 applicable to fiscal

year 1957 for the items reactivated to use in those years.

I hereby approve, pursuant to the provisions of section 246 (b) of the Canal Zone Code, the amounts set forth in the agreement of July 17, 1957, between the Canal Zone Government and the Panama Canal Company, as the amounts at which the properties referred to therein shall be transferred from the Canal Zone Government to the Panama Canal Company.

Sincerely yours,

(Signed) PERCIVAL F. BRUNDAGE,
Director.

Major General William E. Potter
President, Panama Canal Company
Balboa Heights, Canal Zone
Attention: Mr. Merrill Whitman
Secretary, Panama Canal Company
425 - 13th Street, N. W.
Washington, D. C.

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